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EX PARTE YOUNG AND FEDERAL REMEDIES FOR HUMAN RIGHTS TREATY VIOLATIONS

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Abstract: The doctrine of *Ex parte Young* is typically described as an exception to the immunity granted by the Eleventh Amendment of the U.S. Constitution. This Article contends that the *Young* doctrine also stands for the proposition that the Supremacy Clause creates an implied right of action for injunctive relief against state and local government officers who violate federal statutes or treaties. That right of action is available to plaintiffs who seek to enforce federal statutes or treaties against government officers unless Congress foreclosed the availability of a *Young* remedy when it enacted the statute, or the treaty makers foreclosed the availability of a *Young* remedy when they adopted the treaty. A *Young* remedy is therefore available to plaintiffs who raise treaty-based human rights claims against state or local government officers, because the treaty makers did not foreclose the availability of a *Young* remedy when they ratified human rights treaties.

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I. INTRODUCTION

This Article's central thesis is that, under the doctrine of *Ex parte Young*,[1] the Supremacy Clause creates an implied right of action for injunctive relief against state and local government officers who violate federal statutes or treaties. Moreover, plaintiffs should be able to utilize this implied right of action to obtain judicial remedies for human rights treaty violations by state and local government officers.

This thesis has significant implications for three different areas of recent scholarship. First, some scholars have expressed concern that the U.S. Supreme Court's decisions in *Seminole Tribe v. Florida*[2] and *Idaho v. Coeur d'Alene Tribe*[3] may foreshadow a significant and unwarranted curtailment of the *Ex parte Young* doctrine.[4] This Article distinguishes among three distinct elements of the *Young* doctrine: an Eleventh Amendment element, a jurisdictional element, and an implied-cause-of-action element. This Article shows that the U.S. Supreme Court's decisions in *Shaw v. Delta Airlines*[5] and post-*Shaw* statutory preemption cases have extended all three elements of the *Young* doctrine to encompass statutory

1. 209 U.S. 123 (1908).

2. 517 U.S. 44 (1996).

3. 521 U.S. 261 (1997).

4. *See* Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of Ex Parte* Young, 72 N.Y.U. L. Rev. 495, 543–44 (1997) (noting that *Seminole Tribe* "casts doubt on the federal courts' authority to vindicate federal law through equitable relief against state officers. It is thus fundamentally inconsistent with the tradition behind *Marbury v. Madison*'s assertion that the existence of a right implies a remedy"); Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859, 908–12 (2000) (stating that Court's increasingly narrow reading of *Ex parte Young* suggests that further contraction may soon occur). For more sympathetic accounts of the Court's decisions, see David Currie, *Ex parte* Young *After* Seminole Tribe, 72 N.Y.U. L. Rev. 547, 547 (1997) ("*Ex parte Young* is alive and well and living in the U.S. Supreme Court."); John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 49 (1998) (contending that criticisms of U.S. Supreme Court's Eleventh Amendment jurisprudence are exaggerated, because "[t]he Eleventh Amendment almost never matters"). For additional commentary on *Seminole Tribe*, see Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1 (1996), and Henry P. Monaghan, *The Sovereign Immunity Exception*, 110 Harv. L. Rev. 102 (1996). For additional commentary on *Coeur d'Alene*, see Vicki C. Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 Const. Comment. 301 (1998), and Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 Geo. L. J. 1 (1998).

5. 463 U.S. 85 (1983).

preemption claims.[6] Specifically, the statutory preemption cases support the thesis that the Supremacy Clause creates an implied right of action against state officers to enjoin enforcement of state laws that are preempted by federal statutes.[7] Inasmuch as treaties and statutes have equal status under the Supremacy Clause, this Article contends that this implied right of action applies to at least some treaty-based preemption claims as well.[8] The subtext of this argument is that, notwithstanding the Court's decisions in *Seminole Tribe* and *Coeur d'Alene*, the *Young* doctrine is alive and well.

This Article's central thesis is also relevant to the recent wave of revisionist scholarship that has questioned whether customary international law (CIL) is supreme federal law.[9] The debate between revisionists and anti-revisionists is often cast in terms of CIL generally, but the debate is fueled, at least in part, by conflicting views about the legitimacy of judicial decisions upholding plaintiffs' international human rights claims on the basis of CIL.[10] This Article contends that plaintiffs can bring international

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6. There has been surprisingly little commentary on the implications of *Shaw* and its progeny for the *Young* doctrine. *But see* Henry P. Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 Colum. L. Rev. 233, 238–41 (1991) (criticizing *Shaw*).

7. The thesis that the Supremacy Clause creates an implied right of action for statutory preemption claims is not novel. *See* 13B Wright et al., *Federal Practice and Procedure* § 3566, at 102 (1984) [hereinafter Wright & Miller] ("The best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws.").

8. The extension of the Wright & Miller implied-right-of-action thesis to treaty-based preemption claims is novel. However, Professor Vázquez has noted the relevance of *Shaw* to treaty-based claims. *See* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1150 n.286 (1992) (discussing relationship between *Shaw*, Declaratory Judgment Act, and primary rights created by treaties).

9. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 817 (1997) (contending that "contrary to conventional wisdom, CIL should not have the status of federal common law"). For a response to Professors Bradley and Goldsmith, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1827 (1998) (contending that "even casual reflection compels the conclusion that Bradley and Goldsmith are utterly mistaken").

10. *See* Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319, 320 (1997) (contending that "the legitimacy of human rights litigation is what is really at stake in debates" about status of CIL as federal common law, and concluding that "the judicial treatment of international human rights law as federal law" cannot be justified). For responses, see Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 469 (1997) ("The consensus view that universally-recognized human rights are federal common law reflects the considered judgment of the three coordinate branches of government."); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371, 371–72 (1997) (defending "the established doctrine that customary international law norms are incorporated into the U.S. legal system as a form of federal law"), and Beth Stephens, *The Law of Our*

human rights claims in U.S. courts on the basis of human rights treaties that the United States has ratified. Although the text of the Constitution does not say whether CIL is supreme federal law, the Constitution states explicitly that ratified treaties are the "supreme law of the land."[11] Therefore, if this Article is correct, and plaintiffs can bring international human rights claims in U.S. courts on the basis of human rights treaties, the debate about the legitimacy of CIL-based human rights litigation may lose some of its force, because the Constitution itself establishes the legitimacy of treating ratified treaties as supreme federal law.[12]

Finally, this Article bears directly on recent scholarship examining the domestic implications of U.S. ratification of human rights treaties. The United States ratified three human rights treaties in the first half of the 1990s: the International Covenant on Civil and Political Rights (ICCPR),[13] the Torture Convention,[14] and the Race Convention.[15] The conventional

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Land: Customary International Law as Federal Law after Erie, 66 Fordham L. Rev. 393, 397 (1997) ("[T]he suggestion that *Erie* tossed the law of nations out of federal court along with the general common law rests on several misconceptions.").

11. U.S. Const. art. VI, cl. 2. This statement must be qualified by the caveat that, under well-established judicial doctrine, some treaties are not the law of the land. *See infra* notes 74–79 and accompanying text.

12. In a recent article, Professor Yoo argues that "courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing," meaning, in his view, that the treaty is not the supreme law of the land. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 2093 (1999). For criticisms of Professor Yoo's argument, see Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 Colum. L. Rev. 2095 (1999), and Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154 (1999). In this author's view, Professor Yoo's argument is misguided because it mistakenly construes the term "non-self-executing" to mean "not the supreme law of the land." In fact, the term "non-self-executing" has multiple meanings, and the failure to distinguish between those multiple meanings is a source of a great deal of confusion. *See infra* notes 74–79 and accompanying text.

13. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The United States deposited its instrument of ratification for the ICCPR on June 8, 1992. *See* Multilateral Treaties Deposited with the Secretary-General: Status as at 30 Apr. 1999 at 128, U.N. Doc. ST/LEG/SER.E/17, U.N. Sales No. E.99.V.5 (1999) [hereinafter Multilateral Treaties].

14. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. Treaty Doc. No. 100-20, at 19–30 (1988), 23 I.L.M. 1027 [hereinafter Torture Convention]. The United States deposited its instrument of ratification for the Torture Convention on October 21, 1994. *See* Multilateral Treaties, *supra* note 13, at 212.

15. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter Race Convention]. The United States deposited its instrument of ratification on October 21, 1994. *See* Multilateral Treaties, *supra* note 13, at 102.

wisdom is that these treaties are not judicially enforceable in U.S. courts[16] because the treaty makers adopted,[17] for each of the treaties, a declaration stating that the substantive provisions of the treaty are "not self-executing."[18] This Article contends that the conventional wisdom misconstrues both the meaning and purpose of the non-self-executing (NSE) declarations. Properly understood, the NSE declarations mean only that the treaties do not create a private cause of action. However, the treaties create substantive rights that are judicially enforceable by (1) defendants who raise treaty-based defenses to civil or criminal actions initiated by the government, and (2) plaintiffs who invoke other provisions of federal law that supply a private cause of action to enforce substantive rights protected by the treaties.[19]

Part II describes how the conditions adopted by the United States when it ratified human rights treaties affect the rights and remedies available under

16. *See infra* note 72.

17. This Article uses the term "treaty makers" to refer collectively to the President and the Senate, insofar as they are exercising their constitutional treaty-making powers. The Constitution specifies that the President "shall have Power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const., art. II, § 2, cl. 2.

18. The non-self-executing declarations are included in the Senate "resolutions of ratification" for all three treaties. *See* 140 Cong. Rec. 14,326 (1994) (Race Convention); 138 Cong. Rec. 8070 (1992); (ICCPR); 136 Cong. Rec. 36192-93 (1990) (Torture Convention). Identical declarations are also included in the U.S. "instruments of ratification" deposited with the United Nations. *See* Multilateral Treaties, *supra* note 13, at 128 (ICCPR), 98 (Race Convention), 201 (Torture Convention).

19. Some commentators have argued that the treaty makers did not intend to preclude defendants in civil or criminal actions instituted by the government from invoking the treaties defensively. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423, 456 & n.206 (1997) (stating that "the concept of self-execution does not apply. . . to defensive invocations"); John Quigley, *Human Rights Defenses in U.S. Courts*, 20 Hum. Rts. Q. 555, 580–82 (1998) ("Even if courts find that a plaintiff cannot claim treaty-based rights, the Senate expressed no intent to preclude a person from invoking right-guarantee provisions defensively to avert adverse governmental action."); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129, 210–214 (1999) (contending that defensive applications of treaties are consistent with treaty makers' intent in adopting NSE declarations); *see also* Robin H. Gise, Note, *Rethinking* McClesky v. Kemp*: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases*, 22 Fordham Int'l L.J. 2270, 2310 (1999) (stating that NSE declarations do not prevent defendants from invoking treaties "as a defense to criminal or civil charges brought by the government").

Commentators who have espoused the view that defendants have the right to invoke treaty rights defensively have paid scant attention to the possibilities for plaintiffs in civil actions to invoke the treaties offensively. Other commentators, who have explicitly discussed the offensive application of treaties by plaintiffs in civil actions, have not focused specifically on human rights treaties. *See generally* Vázquez, *supra* note 8. This Article fills a gap in the existing scholarship by focusing specifically on offensive applications of human rights treaties in civil suits against government officers.

the treaties. The first section discusses treaty "reservations," which limit the scope of substantive rights that the United States is obligated to protect under the treaties. The next section discusses the NSE declarations, which do not derogate from the substantive rights protected by the treaties, but which do limit the availability of judicial remedies. Proceeding from the premise that courts should apply the treaties in a manner that is consistent with the treaty makers' intent,[20] Part II contends that the NSE declarations were adopted to clarify that the treaty makers did not intend for the human rights treaties themselves to create a private right of action in U.S. courts.[21] However, the NSE declarations were not intended to preclude courts from providing judicial remedies for human rights treaty violations in cases where plaintiffs in civil actions properly invoke other provisions of federal law that do provide a private cause of action.[22] Just as 42 U.S.C. § 1983[23] provides a damages remedy for violations of substantive rights protected by constitutional provisions lacking an express remedy, certain remedial provisions of federal law can supply a private cause of action for violations of substantive rights protected by human rights treaties that do not themselves contain an express remedy.

Part III examines three federal statutes that could potentially provide plaintiffs a private right of action for human rights treaty violations by government officers: the Federal Tort Claims Act (FTCA),[24] which provides a right of action against federal officers for money damages; the Administrative Procedure Act (APA),[25] which provides a right of action against federal officers for specific relief; and 42 U.S.C. § 1983, which

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20. To some extent, there is a tension between the intent of the treaty drafters, as manifested in the language of the treaties, and the intent of the Senate and executive branch, as manifested in the Senate record associated with treaty ratification. The intent of both sets of "treaty makers" is relevant in interpreting the treaty. However, this Article assumes that, in the event of a conflict between treaty drafters and treaty ratifiers, the intent of the ratifiers is controlling as a matter of domestic law.

21. Portions of the material presented in Part II borrow liberally from this author's previous article, which developed this argument in much greater detail. *See* Sloss, *supra* note 19.

22. It is also possible that state law may provide a cause of action that would enable plaintiffs to obtain judicial remedies for violations of unique treaty rights. *See* Vázquez, *supra* note 8, at 1144–46 (discussing use of common law rights of action as bases for judicial remedies for violations of treaty-based substantive rights). However, this Article focuses on the availability of a federal cause of action that would enable plaintiffs to bring claims in either federal or state court.

23. 42 U.S.C. § 1983 (1994).

24. *See* 28 U.S.C. § 1346(b)(1) (Supp. IV 1998) (establishing jurisdiction of federal courts for FTCA claims); 28 U.S.C. §§ 2671–2680 (1994) (establishing procedure for bringing FTCA claims).

25. 5 U.S.C. §§ 701–706 (1994).

provides a right of action against state and local government officers for both money damages and specific relief. The analysis first shows that the FTCA does not provide a cause of action for treaty violations per se, but that treaty rights could still affect the outcome of an FTCA suit by providing plaintiffs a reply to a defense of official authority. Second, the APA does provide plaintiffs a private cause of action for injunctive relief against federal officers who violate their treaty rights. Third, § 1983, as currently interpreted by the U.S. Supreme Court, does not provide plaintiffs a cause of action against state or local officers who violate their treaty rights. The final section of Part III contends that, insofar as the APA provides a federal cause of action for injunctive relief against federal officers who violate treaty rights, there is no persuasive policy justification for denying plaintiffs a federal cause of action for injunctive relief against state and local officers who violate their treaty rights.

Part IV contends that, under the doctrine of *Ex parte Young*,[26] the Supremacy Clause creates an implied right of action for injunctive relief against state and local government officers who violate federal statutes or treaties. The first section briefly summarizes the scope of the Eleventh Amendment and jurisdictional aspects of the *Young* doctrine. The second section defends *Shaw*'s extension of *Young*'s Eleventh Amendment and jurisdictional principles to statutory preemption claims. The third section contends that the Supremacy Clause creates an implied private right of action for claims within the jurisdictional scope of *Young* and *Shaw*. The final section advances the thesis that the implied private right of action extends to treaty-based preemption claims, including alleged human rights treaty violations.

II. U.S. RATIFICATION OF HUMAN RIGHTS TREATIES

The Carter Administration first submitted the ICCPR and the Race Convention to the Senate in 1978,[27] but both treaties remained dormant there for more than a decade. Meanwhile, the Reagan Administration

26. 209 U.S. 123 (1908).

27. *See* Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. Exec. Docs. C, D, E, and F, 95-2 (1978) [hereinafter Carter Message].

submitted the Torture Convention to the Senate in 1988,[28] and the Senate consented to ratification in 1990, during the Bush presidency.[29] Subsequently, in 1991, President George Bush urged the Senate Foreign Relations Committee to renew its consideration of the ICCPR,[30] and the Senate consented to ratification in 1992.[31] Then, in 1994, President Bill Clinton sought Senate approval of the Race Convention,[32] which the Senate provided that same year.[33] The United States ratified the ICCPR in 1992[34] and the Torture and Race Conventions in 1994.[35]

Part II analyzes the conditions adopted by the United States when it ratified these treaties. The first section addresses treaty "reservations," which limit the scope of substantive rights that the United States is obligated, as a matter of international law, to protect.[36] The second section discusses the NSE declarations, which do not modify U.S. obligations under international law. The NSE declarations do not directly affect the

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28. *See* Senate Comm. on Foreign Relations, *Report on Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, S. Exec. Rep. No. 101-30, at 2 (1990) [hereinafter Torture Report].

29. *See* 136 Cong. Rec. 36,192–93 (1990).

30. *See* Senate Comm. on Foreign Relations, *International Covenant on Civil and Political Rights: Report*, S. Exec. Rep. No. 102-23, at 25 (1992) [hereinafter ICCPR Report].

31. *See* 138 Cong. Rec. 8070–71 (1992)

32. *See* Senate Comm. on Foreign Relations, *Report on International Convention on the Elimination of All Forms of Racial Discrimination*, S. Exec. Rep. No. 103-29, at 2 (1994) [hereinafter Race Report].

33. *See* 140 Cong. Rec. 14,326–27 (1994).

34. *See* Multilateral Treaties, *supra* note 13, at 128. Colloquially, people often speak about Senate "ratification" of a treaty. Technically, though, the President ratifies a treaty after obtaining Senate consent. *See* Jordan Paust et al., *International Law and Litigation in the U.S.* 170 (2000). The human rights treaties that are the subject of this Article stipulate that ratification shall be accomplished by depositing an instrument of ratification with the Secretary-General of the United Nations. *See* Torture Convention, *supra* note 14, art. 25, ¶ 2; Race Convention, *supra* note 15, art. 17, ¶ 2; ICCPR, *supra* note 13, art. 48, ¶ 2.

35. *See id.* at 212 (Torture Convention); *id.* at 102 (Race Convention). Although the Senate consented to ratification of the Torture Convention in 1990, the executive branch postponed ratification pending Congressional deliberations on implementing legislation, which was enacted in 1994. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (1994) (codified at 18 U.S.C. §§ 2340–2340B (1994)).

36. Under international law, reservations adopted at the time of ratification permit a state to become a party to a treaty while simultaneously limiting its obligations under the treaty, as a matter of international law, to a subset of the full range of obligations imposed by the treaty. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, ¶ 1(d), 1155 U.N.T.S. 331, 333 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

substantive rights protected by the treaties, but they do limit the availability of judicial remedies.[37]

A. Substantive Rights and Treaty Reservations

Many international-law scholars agree that the scope of substantive rights protected under international human rights treaties is broader, in certain respects, than the scope of substantive rights protected by federal constitutional and statutory law.[38] For example, some scholars have argued that the ICCPR's freedom of religion provision is stronger than the federal constitutional guarantee as currently interpreted by the U.S. Supreme Court.[39] This Article uses the term "redundant treaty rights" to refer to rights protected under international human rights treaties that are accorded equal or greater protection under federal statutory or constitutional law. The term "unique treaty rights" refers to rights protected under international human rights treaties that receive less protection under federal statutory and constitutional law.[40]

Every administration from Carter to Clinton proposed to the Senate a set of "reservations" to be included in the U.S. instrument of ratification.[41]

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37. A strict believer in the maxim that "there are no rights without remedies" might argue that any limitation on the availability of judicial remedies is also, necessarily, a limitation on substantive rights. This author readily concedes that, as a practical matter, a supposed right for which there is no conceivable remedy is not worth the paper it is written on. However, this Article argues below that there is at least a limited range of remedies available for most violations of the substantive rights protected under human rights treaties the United States has ratified. Moreover, it is analytically useful to retain the distinction between rights and remedies to help explain the legal effect of the conditions adopted by the United States.

38. See *infra* notes 53–64 and accompanying text for further discussion.

39. *See* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. Ark. Little Rock L.J. 633, 661 (1998) (stating that ICCPR "appears to demand more protection of religious freedom than is required by [recent] U.S. Supreme Court[] decisions"); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Commentary 33, 43 (1997) (stating that Article 18 of ICCPR expresses broader conception of religious liberty than U.S. Supreme Court's interpretation of free exercise).

40. One could hypothesize a right that is protected by the treaty and state law, but is not protected by federal constitutional or statutory law. Under the definition adopted herein, the treaty right would be considered unique because it is not protected by other provisions of federal law, even though it is protected by the laws of some states.

41. In fact, every administration proposed a set of "reservations," "understandings," and "declarations." *See* Carter Message, *supra* note 27; Torture Report, *supra* note 28, at 7–28; ICCPR Report, *supra* note 30, at 6–21; Race Report, *supra* note 32, at 7–32. According to the U.S. Senate, "reservations" are generally used to modify a party's international legal obligations under a treaty, whereas "understandings" are used to interpret or clarify those obligations. *See* Senate Comm. on

Although different reservations serve different objectives, the main purpose of most of the reservations was to ensure that the United States would not be obligated under the treaties to protect unique treaty rights. For example, Article 6 of the ICCPR obligates parties not to impose the death penalty for crimes committed by persons below eighteen years of age.[42] This is a unique treaty right, because the U.S. Supreme Court has held that the Constitution permits imposition of the death penalty for crimes committed by persons who are sixteen or older.[43] Hence, the U.S. adopted a reservation to preserve its right, under international law, to impose capital punishment for crimes committed by minors.[44]

The United States could have chosen among three distinct options for handling treaty provisions, such as Article 6, that create unique treaty rights. One option would have been to modify domestic law, by statute or otherwise, to give domestic legal effect to unique treaty rights. This approach would ensure U.S. compliance with its treaty obligations, but would require changes in domestic law.[45] A second option would have been to ratify the treaties without reservations, but to refuse to give domestic effect to unique treaty rights. This option would avoid changes in domestic

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Foreign Relations, *Report on The International Convention on the Prevention and Punishment of the Crime of Genocide*, S. Exec. Rep. No. 99-2, at 16 (1985). The Vienna Convention defines the term "reservation" to mean "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention, *supra* note 36, at 333. Some of the so-called "understandings" adopted by the United States arguably constitute "reservations" under international law. This Article uses the term "reservation" in accordance with the definition in the Vienna Convention.

42. ICCPR, *supra* note 13, at art. 6, ¶ 5.

43. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that imposition of capital punishment for murders committed at age sixteen or seventeen "does not offend the Eighth Amendment's prohibition against cruel and unusual punishment").

44. 138 Cong. Rec. 8070 (1992) ("[T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.").

45. For example, the United States could have enacted a statute to prohibit states from imposing the death penalty for crimes committed by persons below eighteen years of age. The U.S. Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920), appears to authorize Congress to enact such a statute as an incident to the treaty power, even if Congress could not enact such a statute in the absence of a treaty. However, recent scholarship has raised questions about the reach of the U.S. Supreme Court's decision in *Missouri v. Holland*, and whether it is still good law. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 458–59 (1998). For a reply to Professor Bradley, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000).

law, but would result in U.S. noncompliance with its treaty obligations.[46] Since the treaty makers wanted to ensure U.S. compliance with its treaty obligations without modifying domestic law, they chose the third option. They attempted to identify every unique treaty right, and adopted a reservation for each such provision stating, in effect, that the United States agreed to be bound by that provision under international law only to the extent that it protected rights already protected under other provisions of federal law.[47]

Thus, the U.S. ratification strategy can be explained as an effort to harmonize two potentially conflicting policy objectives: (1) ensuring U.S. compliance with its treaty obligations,[48] and (2) ensuring that treaty ratification would not expand the scope of domestic legal protection for individual rights.[49] During the ratification process, the executive branch repeatedly assured the Senate that—because the reservations lowered the level of the United States's international legal obligations under the treaties to conform to pre-existing federal law—the United States could comply fully with its treaty obligations without having to change domestic law.[50] Or, to state the point differently, individuals would be able to vindicate all the rights protected under the treaties (as modified by U.S. reservations) without having to invoke the treaties directly, because the reservations eliminated the U.S. obligation to protect unique treaty rights, leaving only

46. For example, if the United States did not adopt a death penalty reservation, and then executed someone for a crime committed at age seventeen, the United States would be guilty of a treaty violation.

47. Several other commentators have also noted this aspect of the U.S. approach to ratification of human rights treaties. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 342 (1995) ("By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies, or practices, even where they fall below international standards."); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DePaul L. Rev. 1287, 1287 (1993) ("When President George Bush urged the U.S. Senate to consent to the ratification of the [ICCPR] . . . Bush assured the Senate that ratification would require no change in U.S. practice.").

48. *See* Sloss, *supra* note 19, at 178–83 (examining Senate record associated with treaty ratification, and contending that Senate record demonstrates that President and Senate placed a high value on ensuring U.S. compliance with its treaty obligations).

49. David Stewart, the State Department's Assistant Legal Adviser for Human Rights and Refugees, affirmed that the executive branch purposefully sought to prevent human rights treaties from altering domestic law. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DePaul L. Rev. 1183, 1206 (1993). In his words, policy makers were guided by the principle "that the United States would not commit itself to do anything that would require a change in present U.S. law or practice." *Id.*

50. *See* Sloss, *supra* note 19, at 183–88 (examining Senate record associated with treaty ratification to show that executive branch "sold" treaties to Senate by promising that United States could achieve full compliance with its treaty obligations without having to make changes in domestic law).

the obligation to protect redundant treaty rights.[51] The Senate consented to ratification on the basis of those assurances, believing that the reservations, by eliminating U.S. obligations to protect unique treaty rights, resolved any potential conflict between the twin goals of treaty compliance and avoiding changes in domestic law.[52]

Despite the treaty makers' best efforts to eliminate U.S. obligations to protect unique treaty rights, there are several human rights treaty provisions to which the United States did not attach reservations that are more protective of rights than federal constitutional or statutory law. For example, Article 17 of the ICCPR protects the right to privacy.[53] The United States did not adopt any reservation with respect to Article 17; it is therefore binding on the United States as a matter of international law.[54] The Human Rights Committee, an international body established by the ICCPR, has held that Article 17 protects the right of adult homosexuals to engage in private consensual sexual activity and that state criminal sodomy laws violate that right.[55] The Committee's interpretation of Article 17 is supported by the fact that the European Convention on Human Rights also

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51. The terms "unique treaty rights" and "redundant treaty rights" are this author's terms. To the best of this author's knowledge, these terms do not appear in the Senate record associated with treaty ratification.

52. Senator Moynihan propounded this interpretation of the treaty reservations:

> Others have raised the legitimate concern that the number of reservations in the administration's package might imply to some that the United States does not take the obligations of the covenant seriously .... [I]t is possible to place a wholly different interpretation on the administration's package of reservations. The administration has ... undertaken a meticulous examination of U.S. practice to ensure that the United States will in fact comply with the obligations that it is assuming.

138 Cong. Rec. 8070 (1992) (statement of Sen. Moynihan); *see also* Sloss, *supra* note 19, at 183–88.

53. ICCPR, *supra* note 13, art. 17, ¶ 1 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.").

54. Although the NSE declaration limits the availability of domestic judicial remedies for violations of Article 17, the NSE declaration does not affect the United States's international legal obligation to comply with Article 17. *See infra* note 97.

55. *See* Toonen v. Australia, U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994), *reprinted in* Int'l Hum. Rts. Rep., Sept. 1994, at 97. The Human Rights Committee's interpretation of the ICCPR is not binding on the United States. However, the Committee's decisions "'are recognized as a major source for interpretation of the ICCPR.'" United States v. Duarte-Acero, 208 F.3d 1282, 1287–88 (11th Cir. 2000) (quoting Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999)).

protects the right to privacy,[56] and the European Court of Human Rights has also ruled that state criminal sodomy laws violate the right to privacy under that Convention.[57] These rulings stand in sharp contrast to the U.S. Supreme Court's decision upholding Georgia's criminal sodomy statute and declining to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[58]

Article 10(1) of the ICCPR is another example of a unique treaty right for which the United States did not adopt a reservation. It states, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[59] On its face, the language of Article 10(1) is more far-reaching than the Eighth Amendment prohibition against cruel and unusual punishment. The Human Rights Committee has construed Article 10(1) to accord greater protection for detainees than is provided by Article 7 of the ICCPR, which prohibits "cruel, inhuman or degrading treatment or punishment."[60] Moreover, the

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56. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 230. Paragraph 1 of Article 8 provides the following: "Everyone has the right to respect for his private and family life, his home and his correspondence." *Id.* at art. I, ¶ 8.

57. *See* Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981).

58. Bowers v. Hardwick, 478 U.S. 186, 192 (1986). The disparity between U.S. constitutional law and international human rights law in this area has received a good deal of scholarly attention. *See* William N. Eskridge, Jr., Hardwick *and Historiography*, 99 U. Ill. L. Rev. 631, 676–77 (1999); Elizabeth McDavid Harris, *Intercourse Against Nature: The Role of the Covenant on Civil and Political Rights and the Repeal of Sodomy Laws in the United States*, 18 Hous. J. Int'l L. 525, 555–56 (1996); Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 Harv. Hum. Rts. J. 61, 78 (1996); Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with* Bowers v. Hardwick, 58 Alb. L. Rev. 725, 730–33 (1995); James D. Wilets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 Colum. Hum. Rts. L. Rev. 33, 41 (1995); Edward H. Sadtler, Note, *A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?*, 40 Va. J. Int'l L. 405, 418–23 (1999).

59. ICCPR, *supra* note 13, art. 10, ¶ 1.

60. ICCPR, *supra* note 13, art. 7. The Human Rights Committee has stated that Article 10(1) "imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant." U.N. Doc. HRI\GEN\1\Rev.1, at 33 (1994). There are cases in which the Human Rights Committee has found that certain conduct violates both Article 7 and Article 10(1). *See* John Wight v. Madagascar, U.N. GAOR, Hum. Rts. Comm., 40th Sess., Supp. No. 40, at 171, U.N. Doc. A/40/40 (1985). However, there are also cases in which the Committee has found a violation of Article 10(1) without a corresponding violation of Article 7, thereby indicating that Article 10(1) provides heightened protection for detainees beyond the rights protected by Article 7. *See* Teresa Gomez de Voituret v. Uruguay, U.N. GAOR, Hum. Rts. Comm., 39th Sess., Supp. 40, at 164, U.N. Doc. A/39/40 (1984) (noting solitary confinement violates Article 10(1), but not Article 7); Jorge Manera Lluberas v. Uruguay, U.N. GAOR, Hum. Rts. Comm.,

United States has recognized that Article 7 is more rights-protective than the U.S. Constitution.[61] Since Article 10(1) accords greater protection than Article 7, and Article 7 accords greater protection than the U.S. Constitution, it follows that Article 10(1) protects rights that do not receive comparable protection under the U.S. Constitution. Indeed, the U.N. Human Rights Committee has stated that the conditions of detention in certain U.S. prisons (which may or may not conform to constitutional standards) are "incompatible with article 10."[62] The United States did not adopt any reservation with respect to Article 10(1); it is therefore binding on the United States as a matter of international law.[63]

The above examples do not exhaust the list of unique treaty rights that the United States has an international legal obligation to protect.[64] Even so, these examples illustrate the point that human rights treaties ratified by the United States may be more rights-protective in certain respects (even with the attached reservations) than other provisions of federal law. The treaty

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39th Sess., Supp. 40, at 175, U.N. Doc. No. A/39/40 (1984) (noting conditions of detention violate Article 10(1), but not Article 7); Luyeye Magana ex-Philibert v. Zaire, U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40, at 197, U.N. Doc. A/38/40 (1983) (same).

61. The United States adopted a reservation to Article 7, stating that "the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States." 138 Cong. Rec. 8070 (1992). The treaty makers' choice to label this a "reservation," rather than an "understanding," indicates their belief that the rights protected under Article 7 exceed the scope of constitutional protections. That belief is probably correct. *See* David Heffernan, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 Cath. U. L. Rev. 481, 560 (1996) (comparing U.S. Supreme Court's Eighth Amendment jurisprudence with international decisions construing Article 7 and concluding that there are "significant areas of protection under the international standard that are not available under the Eighth Amendment").

62. U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg. at 4, ¶20, U.N. Doc. CCPR/C/79/Add. 50 (1995); *see also* Human Rights Watch & American Civil Liberties Union, *Human Rights Violations in the United States* 98–113 (1993) (analyzing prison conditions in United States in terms of compliance with international standards).

63. Although the NSE declaration limits the availability of domestic judicial remedies for violations of Article 10(1), the NSE declaration does not affect the United States's international legal obligation to comply with Article 10(1). *See infra* note 97.

64. As noted above, commentators have argued that human rights treaties provide broader protection for religious freedom than comparable provisions of U.S. constitutional and statutory law. *See supra* note 39 and accompanying text. In addition, several commentators have argued that the ICCPR provides greater protection against international kidnapping than does federal constitutional or statutory law. *See, e.g.*, Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After* Alvarez-Machain, 29 Cornell Int'l L.J. 383, 404–10, 440–42 (1996); John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on* United States v. Alvarez-Machain, 68 Notre Dame L. Rev. 723, 744–46 (1993); Timothy D. Rudy, *Did We Treaty Away* Ker-Frisbie*?*, 26 St. Mary's L.J. 791, 811–17 (1995).

makers' failure to adopt reservations for all unique treaty rights poses a dilemma for the judiciary. Judicial enforcement of unique treaty rights would be inconsistent with the treaty makers' policy goal of avoiding changes in domestic law.[65] But in a properly presented case, judicial refusal to enforce a unique treaty right for which the U.S. did not adopt a reservation would be inconsistent with the goal of ensuring U.S. compliance with its international legal obligations.[66] Resolution of this dilemma requires consideration of the NSE declarations.

B. Judicial Remedies and the Non-Self-Executing Declarations

A few commentators have argued that the NSE declarations are or may be unconstitutional.[67] Others contend that the NSE declarations are not legally binding, because they are not part of the treaties.[68] This section assumes that, even if the NSE declarations are not legally binding,[69] courts should apply (or not apply) the treaties in a manner that is consistent with

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65. If the judiciary enforces unique treaty rights, then judges could, for example, invalidate a state statute on the grounds that it conflicts with a treaty provision, which is supreme federal law. That would be inconsistent with the policy objective of ensuring that treaty ratification would not modify domestic law.

66. If some other branch of state or federal government takes appropriate steps to remedy violations of unique treaty rights, then judicial enforcement is unnecessary. But in cases where the treaties do protect unique rights and the political branches fail to make changes in statutory law to protect those unique rights, judicial enforcement of the treaties is necessary to ensure U.S. compliance with its treaty obligations.

67. *See, e.g.*, Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 Colum. J. Transnat'l L. 211, 222 ("U.S. declarations making human rights treaties non-self-executing are ill-advised and probably unconstitutional."); Henkin, *supra* note 47, at 346 ("Whatever may be appro-priate in a special case, as a general practice such a [non-self-executing] declaration is against the spirit of the Constitution; it may be unconstitutional."); Jordan Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 Mich. J. Int'l L. 301, 324 (1999) ("[A] declaration of non-self-execution, even if not void under international law, is unconstitutional and void under the Supremacy Clause."). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent* (manuscript on file with author) (contending that NSE declarations are consistent with Supremacy Clause); Vázquez, *supra* note 12, at 2186–88 (contending that treaty makers have power to deprive treaties of domestic legal force).

68. *See* Quigley, *supra* note 19, at 582–85 (contending that NSE declaration attached to ICCPR is "not part of the treaty, hence not part of what, according to the Supremacy Clause, is the supreme law of the land"); Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 Chi.-Kent L. Rev. 293, 296–97 (1991) (contending that NSE declaration, like one attached to Torture Convention, "is not part of a treaty . . . [but] is merely an expression of an interpretation or of a policy or position," and that U.S. courts "are not bound to apply expressions of opinion adopted by the Senate").

69. The author expresses no view as to whether the NSE declarations are or are not legally binding.

the treaty makers' intent in adopting the NSE declarations.[70] Additionally, this section suggests that courts can and should avoid the constitutional issue by interpreting the NSE declarations narrowly.[71] Thus, this section focuses on the meaning and purpose of the NSE declarations.

Most commentators have assumed that the purpose and legal effect of the NSE declarations adopted by the United States is to prevent U.S. courts from providing judicial remedies for violations of unique treaty rights.[72] Under this view, the treaty makers resolved the dilemma described above by

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70. The *Restatement (Third) of the Foreign Relations Law of the United States* states:

> A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as 'supreme Law of the Land.' . . . The effectiveness of such a Senate proviso, however, does not depend on its becoming law of the land as part of the treaty. Such a proviso is an expression of the Senate's constitutional authority to grant or withhold consent to a treaty, which includes authority to grant consent subject to a condition. The authority to impose the condition implies that it must be given effect in the constitutional system.

Restatement (Third) of the Foreign Relations Law of the United States § 303 n.4 (1987). Of course, if a binding provision of law requires one result, and a non-binding declaration expresses the treaty maker's intent to achieve a contrary result, the binding provision of law would take precedence.

71. *See infra* note 77.

72. *See, e.g.*, Buergenthal, *supra* note 67, at 220–21 (stating that NSE declarations prevent American courts from applying these treaties as domestic law); Conkle, *supra* note 39, at 661–62 (stating that ICCPR "is not yet enforceable as part of domestic law of the United States, because—according to Senate declaration—the ICCPR is not self-executing"); Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 Chi.-Kent L. Rev. 515, 516 (1991) (noting that NSE declarations mean that treaties "require implementing action by the political branches of government or . . . are otherwise unsuitable for judicial application"); Henkin, *supra* note 47, at 346 (arguing NSE declarations are designed to prevent U.S. "judges from judging the human rights conditions in the United States by international standards"); Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 How. L.J. 571, 588 (1997) (stating that NSE declaration attached to Race Convention "stripped the U.S. judiciary of any meaningful role in interpreting" it); Neuman, *supra* note 39, at 43 (stating that NSE declaration attached to ICCPR means that treaty is "not directly enforceable in the courts"); Stewart, *supra* note 49, at 1202 (noting that NSE declaration attached to ICCPR means that ICCPR "does not, by itself, create private rights enforceable in U.S. courts"); Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 How. L.J. 641, 642–43 (1997) (stating that Race Convention "has consciously been rendered impotent due to U.S. insertion of a non-self-executing declaration"); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 Minn. L. Rev. 35, 67 (1978) (concluding that effect of NSE declarations "is to deprive American courts of their most potent technique for contributing meaningfully to the interpretation [of the human rights treaties]"); Barbara MacGrady, Note, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 Brook. J. Int'l L. 271, 300 (1997) ("Since Congress has made its intent clear [by adopting NSE declarations], it is certain that the courts will not enforce these treaties in a domestic action.").

commanding the judiciary, through the NSE declarations, not to provide remedies for violations of treaty rights, even in cases where judicial refusal to enforce unique treaty rights would result in U.S. non-compliance with its international legal obligations.[73] This interpretation misconstrues both the meaning and the purpose of the NSE declarations.

1. The Meaning of the Non-Self-Executing Declarations

The term "non self-executing" has multiple meanings.[74] For present purposes, though, it will suffice to distinguish three possible meanings of the term, as applied to human rights treaties. One possible meaning of the NSE declarations is that human rights treaties ratified by the United States have no status as domestic law in the absence of implementing legislation.[75] Because the United States has not enacted implementing legislation for the treaties,[76] this interpretation suggests that the treaties do not create any substantive rights, as a matter of domestic law, much less provide for

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73. Most judicial opinions that have discussed the legal effect of the NSE declarations have construed those declarations as expressions of the treaty makers' intent to preclude judicial remedies and have accordingly refused to provide such remedies. *See* Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (rejecting Puerto Rican voting-rights claim based on Article 25 of ICCPR); Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244, 1257 (C.D. Cal. 1999) (rejecting claim by prisoner based on ICCPR and Torture Convention); White v. Paulsen, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (rejecting claims by former prisoners based, inter alia, on Torture Convention and ICCPR); *In re* Extradition of Cheung, 968 F. Supp. 791, 803 n.17 (D. Conn. 1997) (rejecting defense to extradition based on Article 3 of Torture Convention). *But see* Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) (stating that plaintiff "could bring a claim under the Alien Tort Claims Act for violations of the ICCPR").

74. Several scholars have noted the ambiguity in the term "non self-executing" as applied to treaties. John H. Jackson, *United States*, in *The Effect of Treaties in Domestic Law* 147–56 (Francis G. Jacobs & Shelley Roberts eds., 1987) (discussing implementation and application of treaties in U.S. law); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 Va. J. Int'l L. 627, 635–42 (1986) (summarizing various meanings of term "self-executing"); Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 766–68, 783 (1988) (contending that almost all treaties are self-executing); Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal: *Win at Any Price?*, 74 Am. J. Int'l L. 892, 896–97, 900 (1980) (criticizing Fifth Circuit's decision in *United States v. Postal* and analyzing methods used to determine if treaty is self-executing); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 695–96, 704–05 (1995) (contending that there are four distinct doctrines of self-execution and analyzing those doctrines).

75. *See Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) (stating that treaty is non-self-executing if it "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation").

76. There is no implementing legislation for the ICCPR or the Race Convention. There is implementing legislation for the Torture Convention, *see supra* note 35, but it merely addresses one narrow aspect of that Convention. It is not designed to implement the Torture Convention as a whole. *See* Sloss, *supra* note 19, at 160–61.

judicial remedies. This interpretation raises a potential constitutional problem because the treaties were made under the authority of the United States, and the Supremacy Clause states explicitly that all treaties made "under the authority of the United States" are the supreme law of the land.[77] Even assuming that the NSE declarations could deprive the treaties of domestic legal status, that was not the treaty makers' intention. Executive branch officials repeatedly told the Senate during the ratification process that, even with the NSE declarations, the ratified treaties would be the supreme law of the land under the Supremacy Clause.[78] Thus, the NSE declarations notwithstanding, the treaties do create substantive domestic legal rights (as modified by treaty reservations).[79]

A second possible interpretation is that the NSE declarations prevent U.S. courts from providing any judicial remedies for violations of treaty rights. This "no judicial remedies" interpretation is consistent with case law that distinguishes between self-executing and non-self-executing treaties on the basis of separation-of-powers principles.[80] Under this interpretation, the

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77. U.S. Const., art. VI, cl. 2. This author does not wish to suggest that the NSE declarations, under this interpretation, would necessarily be unconstitutional. That is an open question. *See supra* note 67. However, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." Aswhander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This well-established principle supports a construction of the NSE declarations that is consistent with the proposition that the treaties have domestic legal status as supreme law of the land.

78. *See International Convention on the Elimination of All Forms of Racial Discrimination: Hearing Before the Sen. Comm. on Foreign Relations*, 103d Cong. 103-659, at 18 (1994) [hereinafter Race Hearing] (statement of Conrad Harper, State Department Legal Adviser) (stating that, although Race Convention is not self-executing, "[u]nder Article VI, Clause 2 of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute"); *International Covenant on Civil and Political Rights: Hearing Before the Sen. Comm. on Foreign Relations*, 102d Cong. 102-478, at 80 (1992) [hereinafter ICCPR Hearing] (containing executive branch response to written questions submitted by Senator Helms) ("Under the Supremacy Clause, ratified treaties are the law of the land, equivalent to federal statutes.... Consequently, properly ratified treaties can and do supersede inconsistent domestic law."); *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Hearing Before the Sen. Comm. on Foreign Relations*, 101st Cong. 101-718, at 42 (1990) [hereinafter Torture Hearing], at 42 (statement of Abraham Sofaer, State Department Legal Adviser) ("If you adopt this treaty, it is not just international law. The standard becomes part of our law.").

79. *See* United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (stating that ICCPR is "the supreme law of the land," despite NSE declaration); Maria v. McElroy, 68 F. Supp. 2d 206, 231–32 (E.D.N.Y. 1999) ("Although the ICCPR is not self-executing, it is an international obligation of the United States and constitutes a law of the land.") (citations omitted).

80. *See* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (noting NSE treaties are addressed "to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court").

treaties create substantive domestic legal rights, but treaty implementation is strictly an executive branch function (absent implementing legislation), and the judicial branch is not authorized to provide remedies for treaty violations.[81] There are some statements in the Senate record that support this construction of the NSE declarations.[82] However, this interpretation also poses a potential constitutional problem, insofar as it ostensibly bars judicial remedies for defendants in state courts.[83]

A third possible interpretation is that the NSE declarations merely preclude litigants from relying on the treaties to establish a private right of action. This is the "no private right of action" concept. This interpretation is consistent with judicial opinions that distinguish between self-executing and non-self-executing treaties on the grounds that non-self-executing treaties do not create a private cause of action.[84] There are also statements in the

81. The "no judicial remedies" interpretation does not mean that there are no remedies for treaty violations. For example, consider a hypothetical alien in an INS removal proceeding who claims that deportation would violate his right, under Article 3 of the Torture Convention, not to be deported to a "[s]tate where there are substantial grounds for believing that he would be in danger of being subjected to torture." Torture Convention, *supra* note 14, art. 3, ¶ 1. Assuming that the alien, as a factual matter, has a valid treaty claim, the presiding immigration judge, who is an executive branch officer, *see* 8 C.F.R. §§ 1.1(l), 3.0 (1998), would have the authority under the "no judicial remedies" concept to block deportation to carry out the U.S. treaty obligation. More broadly, the "no judicial remedies" concept is consistent with administrative enforcement of U.S. treaty obligations. *See* Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DePaul L. Rev. 1241, 1244–47 (1993) (contending that NSE declaration does not preclude administrative enforcement of ICCPR).

82. *See* Sloss, *supra* note 19, at 157–67.

83. Assuming that human rights treaties are the "Law of the Land" under the Supremacy Clause, that Clause, which specifies that "judges in every state shall be bound" by treaties, U.S. Const., art. VI, cl. 2, may require state court judges to provide remedies for defendants whose treaty rights have been violated. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 88 (1999) ("Indeed, it may be that the only constitutionally mandatory . . . remedial scheme is the right of a target of government prosecution or enforcement to defend against that action on the ground that it violates the superior law of the Constitution."). Although Professor Jeffries is concerned primarily with constitutional rights, the point applies with equal force to state court defendants who allege that state laws violate superior federal statutory or treaty law because statutues and treaties, like the Constitution, are supreme federal law.

84. *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992) ("[N]o private cause of action can ever be implied from a non-self-executing treaty."); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) ("Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action"); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) ("[U]nless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action"); *see also* Sloss, *supra* note 19, at 151 n.119.

Senate record that support this interpretation.[85] Under this interpretation, courts can provide judicial remedies for violations of treaty rights when litigants invoke the treaties defensively in civil or criminal actions initiated by the government.[86] Moreover, courts can provide judicial remedies to plaintiffs who rely on federal statutes to provide a right of action for judicial enforcement of treaty rights.[87] This interpretation is not problematic from a constitutional standpoint.

Executive branch explanations of the NSE declarations changed over time from a "no judicial remedies" concept to a "no private right of action" concept.[88] The Carter Administration, which first proposed the NSE declarations, said that the declarations precluded any judicial remedies for violations of treaty rights.[89] But the Senate did not act on the treaties during the Carter Administration. The Senate consented to ratification of the Race Convention during the Clinton Administration, which explained the NSE declaration to the Senate in terms of the "no private right of action" concept.[90] The Senate consented to ratification of the ICCPR and the Torture Convention during the Bush Administration.[91] The Bush Administration's explanation of the NSE declarations shifted between a "no judicial remedies" concept and a "no private right of action" concept.[92] Because executive branch explanations of the meaning of the NSE declarations were not wholly consistent, it is necessary to consider the purpose of the NSE declarations.

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85. *See* Race Report, *supra* note 32, at 25–26 ("The intent [of the NSE declaration] is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts."); ICCPR Report, *supra* note 29, at 19 ("The intent [of the NSE declaration] is to clarify that the Covenant will not create a private cause of action in U.S. courts.").

86. *See* Vázquez, *supra* note 8, at 1143–44 (contending that right of action is not necessary to invoke treaty as defense).

87. *See id.* at 1146–48 (contending that federal statutes can provide right of action to authorize judicial remedies for violations of treaty rights). A variant of the "no private right of action" concept would permit litigants to invoke the treaties defensively, but not offensively. *See infra* notes 468–77 and accompanying text.

88. Executive branch explanations are key because the executive branch proposed the NSE declarations. *See* Sloss, *supra* note 19, at 152–71. The Senate merely acquiesced, generally without commenting on the NSE declarations. *See id.*.

89. *See* Sloss, *supra* note 19, at 157–59.

90. *See id.* at 169–71.

91. *See supra* notes 29–31.

92. *See* Sloss, *supra* note 19, at 161–69.

2. *The Purpose of the Non-Self-Executing Declarations*

As noted above, the treaty makers' failure to adopt reservations for all unique treaty rights poses a dilemma for the judiciary. A judicial decision to provide a remedy for violation of a unique treaty right would be inconsistent with the treaty makers' policy goal of avoiding changes in domestic law. But refusal to provide a remedy would be inconsistent with the goal of ensuring U.S. compliance with its international legal obligations.

Advocates of the "no judicial remedies" interpretation of the NSE declarations might argue that the treaty makers resolved this dilemma in the following manner. The treaty makers recognized that—despite their best efforts to eliminate, by means of reservations, all U.S. obligations to protect unique treaty rights—they might have failed to adopt a reservation for one or more unique treaty rights. Recognizing this possibility, and recognizing the dilemma this would pose for the judiciary, they adopted the NSE declarations as a means of instructing the judiciary not to provide remedies for violations of unique treaty rights.[93] The treaty makers recognized that failure to remedy a violation of a unique treaty right would be inconsistent with the goal of ensuring U.S. compliance with its international legal obligations.[94] But, according to this view, the treaty makers weighed the trade-offs between the policy goal of ensuring treaty compliance, and the policy goal of avoiding changes in domestic law, and made a conscious decision that, in the event of a conflict between the two goals, the goal of avoiding changes in domestic law should take precedence. The NSE declarations, construed in accordance with the "no judicial remedies" concept, manifest this policy choice to preclude judicial remedies for violations of unique treaty rights.[95]

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93. Implicit in this argument is the assumption that many unique treaty rights would be judicially enforceable if the United States had not adopted the NSE declarations. That assumption is generally accurate. *See* Damrosch, *supra* note 72, at 516–17 ("It is the assumption of this essay that in [NSE] declarations of this kind, the Senate has attempted to switch self-executing treaty provisions into the non-self-executing category."); Sloss, *supra* note 19, at 153–57.

94. The United States has a general obligation, under each of the treaties, to provide effective remedies for violations of treaty rights. *See* Sloss, *supra* note 19, at 142–44; *see also infra* notes 465–62 and accompanying text.

95. An alternative defense of the "no judicial remedies" concept is that the NSE declarations were intended to compel the judiciary to interpret the treaties in accordance with the treaty makers' understanding that the treaties, as modified by U.S. reservations, do not protect any unique rights. The central difficulty with this explanation is that treaty interpretation is primarily a judicial function, not a legislative or executive function. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. e (1987). Moreover, insofar as this

There are several problems with this explanation. First, nothing in the Senate record associated with any of the three treaties indicates that the executive branch, or the Senate, anticipated the possibility that they might have failed to adopt a reservation for one or more unique treaty rights. To the contrary, the executive branch repeatedly assured the Senate that the reservations successfully eliminated any and all obligations to protect unique treaty rights,[96] and the Senate concurred in this assessment.[97] The "no judicial remedies" concept, insofar as it assumes that the NSE declarations were intended to preclude judicial remedies for violations of unique treaty rights, cannot be reconciled with the treaty makers' stated view that the reservations successfully eliminated any obligation to protect unique treaty rights. It makes no sense to argue that the treaty makers intended to preclude remedies for violations of unique treaty rights when the treaty makers stated repeatedly that there were no such rights under the treaties, as modified by the reservations.

Second, nothing in the Senate record indicates either that the executive branch or the Senate believed that the NSE declarations were inconsistent with the goal of ensuring U.S. compliance with its treaty obligations. To the contrary, the executive branch emphasized that the NSE declarations would not affect treaty compliance.[98] Moreover, nothing in the Senate record

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explanation relies on the political branches to make a generalized assessment of the relationship between treaty rights and U.S. law, it is also inconsistent with the treaty obligation to ensure that each person who claims a right to a remedy for an alleged treaty violation receives an individual hearing before an impartial tribunal. *See infra* note 465.

96. *See* Race Report, *supra* note 32, at 25–26 (stating that "existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention" as modified by reservations); ICCPR Report, *supra* note 30, at 10 (suggesting that United States can rely on preexisting domestic law to fulfill its obligations under treaty provisions for which Administration did not propose reservation); Torture Report, *supra* note 28, at 13–28 (explaining in detail how pre-existing U.S. law satisfies virtually every provision of Convention, and how U.S. reservations would eliminate any discrepancies between treaty requirements and U.S. law); Carter Message, *supra* note 27, at vi (stating that proposed reservations "are designed to harmonize the treaties with existing provisions of domestic law"); *see also* Sloss, *supra* note 19, at 183–88 (analyzing Senate record).

97. *See* ICCPR Report, *supra* note 30, at 4 (expressing Senate Foreign Relations Committee's view that the Administration's proposed reservations successfully harmonized the ICCPR requirements with preexisting domestic law); Torture Report, *supra* note 28, at 4 (expressing Senate Foreign Relations Committee's belief that reservations "resolve fully any potential conflicts between the Convention and U.S. law"); *see also supra* note 52 (statement of Senator Moynihan).

98. *See* ICCPR Hearing, *supra* note 78, at 71 (statement of William T. Lake, Member, Board of Directors, International Human Rights Law Group) (explaining, in response to question from Senator Sarbanes, that non-self-executing declaration "is not a matter of our international obligation, it . . . is a domestic matter"); *International Human Rights Treaties: Hearings Before the Sen. Comm. on Foreign Relations*, 96th Cong. 29–30 (1979) [hereinafter Carter Hearings] (statement of Roberts B. Owen, Legal

indicates that the treaty makers made a conscious choice to elevate the goal of avoiding changes in domestic law above the goal of treaty compliance.[99] In fact, there is at least some evidence in the Senate record to support the opposite inference: that treaty compliance was the most important goal.[100]

Advisor, U.S. Department of State) (saying that NSE declarations "would not derogate from or diminish in any way our international obligations under the treaties"); Race Report, *supra* note 32, at 26 ("Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law.").

99. Executive branch explanations of the NSE declarations that conform to the "no judicial remedies" concept were provided in conjunction with assurances that the reservations eliminated all U.S. obligations to protect unique treaty rights. *See supra* note 96. Therefore, those statements do not support an inference that the treaty makers purposefully downgraded the goal of treaty compliance.

100. Both the ICCPR and the Race Convention contain "hate speech" provisions that obligate the United States to ban speech that is protected by the First Amendment. *See* ICCPR, *supra* note 13, art. 20, ¶ 2 (obligating parties to ban "advocacy of national, racial or religious hatred"); Race Convention, *supra* note 15, art. 4(b) (obligating parties to ban organizations "which promote and incite racial discrimination"). The United States adopted reservations for both provisions. *See* 140 Cong. Rec. 14326 (1994) (Race Convention); 138 Cong. Rec. 8070 (1992) (ICCPR). Because the Constitution takes precedence over a treaty, *see Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. a (1987), treaties could not, as a matter of domestic law, authorize the United States to ban speech that is protected by the First Amendment. Thus, even if the United States had not adopted reservations for the hate speech provisions, those provisions would not have had any domestic legal effect, because they would have been trumped by the First Amendment. Therefore, unlike most of the other reservations, which were designed to satisfy the twin goals of treaty compliance and avoiding changes in domestic law, *see supra* notes 45–52 and accompanying text, the hate speech reservations are relevant only to the goal of treaty compliance, not to the goal of avoiding changes in domestic law.

Even so, the Carter, Bush, and Clinton administrations all characterized the hate speech reservations as being essential. *See* Race Hearing, *supra* note 78, at 17 (statement of Conrad K. Harper, Legal Advisor, U.S. Department of State) (saying that hate speech reservation "is *required* by the First Amendment") (emphasis added); ICCPR Hearing, *supra* note 78, at 18 (statement of Richard Schifter, Assistant Secretary of State For Human Rights and Humanitarian Affairs) (saying that "[i]t is *axiomatic* that the United States cannot agree in a treaty to an unconstitutional obligation" and that "*[w]e must*" reserve on the hate speech provision) (emphasis added); Carter Hearings, *supra* note 98, at 42 (statement of Roberts B. Owen, Legal Advisor, U.S. Department of State) (calling hate-speech reservations "*absolutely essential* in order to avoid conflicts with our own Constitution") (emphasis added). In fact, the hate-speech reservations are neither "essential" nor "required," nor is it "axiomatic" that they are needed, unless one assumes that the goal of treaty compliance is sacrosanct.

Whereas every administration characterized the hate speech reservations as being essential, they typically characterized the other reservations as merely desirable. *See* Race Hearing, *supra* note 78, at 18 (statement of Conrad K. Harper, Legal Advisor, U.S. Department of State) (characterizing one other proposed reservation as "prudent," but not necessary); Carter Hearings, *supra* note 98, at 42 (statement of Roberts B. Owen, Legal Advisor, U.S. Department of State) (stating that free-speech reservations were essential, then adding: "As to the other reservations, if the Senate should decide that they are not necessary, I think the administration would be willing to dispense with them. Then we would be, in effect, bringing about a more rigorous civil rights regime."). The characterization of other reservations as merely desirable is significant because failure to adopt the other reservations, unlike the hate-speech reservations, could have compromised the goal of avoiding changes in domestic law. *See supra* note 65 and accompanying text. Thus, executive branch statements about the reservations support the inference that the goal of treaty compliance was paramount.

Insofar as the "no judicial remedies" concept assumes that the NSE declarations manifest the treaty makers' intent to subordinate the policy goal of treaty compliance, that concept cannot be reconciled with the evidence from the Senate record showing that treaty compliance was of paramount concern.[101]

Third, there is no evidence to support the proposition that the treaty makers weighed the trade-offs between the policy goal of ensuring treaty compliance and the policy goal of avoiding changes in domestic law, or that they made a conscious policy choice to accord priority to the latter goal by precluding judicial remedies for violations of unique treaty rights. Indeed, the treaty makers had no reason to decide whether to permit judicial remedies for violations of unique treaty rights, because they consistently maintained that the reservations eliminated any obligation to protect unique treaty rights.[102] Moreover, any explicit decision to allow or not to allow judicial remedies for violations of unique treaty rights would have upset the delicate political balance that permitted ratification to proceed. On the one hand, an explicit decision not to permit such judicial remedies would have been inconsistent with the goal of treaty compliance and would have jeopardized the support of senators who believed, as a matter of principle, that the United States should not ratify any treaty with which it is not prepared to comply. On the other hand, an explicit decision to permit such judicial remedies would have been inconsistent with the goal of avoiding changes in domestic law and would have jeopardized the support of senators who believed, as a matter of principle, that human rights treaties should not be used to effect domestic legal reform. So the treaty makers ducked the issue. They refused to decide whether to permit judicial remedies for violations of unique treaty rights, because any explicit decision might have doomed the prospects for ratification.[103]

For a more detailed examination of the Senate record as it relates to this point, *see* Sloss, *supra* note 19, at 178–83.

101. The treaty makers' intent to comply fully with human rights treaties is also manifest in an executive order adopted in 1998. *See* Implementation of Human Rights Treaties, Exec. Order No. 13,107, 3 C.F.R. § 234, (1998) ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party . . . .").

102. *See supra* notes 50–52, 96–97 and accompanying text.

103. It has been widely observed that Congress uses purposeful ambiguity as a tool for building consensus in support of controversial legislation. *See* Kristy L. Carroll, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements when Interpreting Federal Statutes*,

If the NSE declarations were not intended to preclude judicial remedies for violations of unique treaty rights, one might ask, what possible purpose could they serve? To understand the purpose of the NSE declarations, one must view the declarations from the perspective of the treaty makers, who believed, or acted as if they believed,[104] that the reservations had successfully extinguished all U.S. obligations to protect unique treaty rights. If that belief was accurate, then the distinction between the "no judicial remedies" concept and the "no private right of action" concept would be a distinction without a difference, because the NSE declarations would have no practical effect.[105] Even under the "no judicial remedies" concept, the NSE declarations would merely preclude judicial remedies for violations of redundant treaty rights, which would be protected by other provisions of federal law. And that is precisely how the executive branch explained the effect of the NSE declarations to the Senate. The executive branch told the Senate that the NSE declarations were entirely consistent with U.S. treaty

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46 Cath. U. L. Rev. 475, 486 (1997) (noting that statutory ambiguity is often result of deliberate compromise); Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, 57 Law & Contemp. Probs. 43, 45 (1994) (noting that deliberate inconsistencies in statutes are "evidence of the absence of coherence among members of the enacting coalition . . . [that give] the courts a free shot at policymaking"); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 Duke L.J. 380, 380–81 (1987) (contending that statutory ambiguity results from trying to get 535 "prima donnas . . . to agree on a single set of words"); *see also* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984) (suggesting that statutory ambiguity in environmental statute may have resulted from Congress' inability "to forge a coalition on either side of the question"). Thus, it should not be surprising that the Senate and the executive branch, acting in their treaty making roles, would adopt a strategy of deliberate ambiguity to build a consensus in favor of treaty ratification.

104. The treaty makers' statements consistently expressed the view that the reservations had eliminated any and all U.S. obligations to protect unique treaty rights, thereby enabling the United States to fulfill its treaty obligations without changing domestic law. *See supra* notes 50–52 and 96–97 and accompanying text. Whether they actually believed those statements is a different matter. But the possibility that they may not have believed their own statements simply reinforces the point that to obtain a consensus in favor of ratification it was necessary to maintain the fiction of complete harmony between treaty obligations and pre-existing domestic law, along with its logical corollary: the fiction that there was no conflict between the goal of treaty compliance and the goal of avoiding changes in domestic law.

105. One could argue that a key difference between the "no judicial remedies" concept and the "no private right of action" concept is that the former enables courts to avoid protracted litigation over redundant and frivolous treaty-based claims, whereas the latter requires expenditure of judicial resources to resolve such claims. Hence, the distinction between the two concepts does have an impact on the courts. However, if all treaty rights were truly redundant, the NSE declarations would not affect the outcome of litigation because plaintiffs with meritorious treaty claims could prevail on the basis of redundant federal rights. Moreover, even under the "no private right of action" concept, this author is confident that courts will be able to filter out redundant and frivolous treaty-based claims with only a minimal expenditure of judicial resources.

obligations,[106] because redundant provisions of federal law ensured the protection of treaty rights.[107] Thus, the message implicit in executive branch statements to the Senate was that the NSE declarations were not intended to have any practical effect.[108]

This does not mean, however, that courts are free to disregard the NSE declarations.[109] In construing the declarations, courts should recognize that the treaty makers refused to decide, as a general matter, whether to permit judicial remedies for violations of unique treaty rights. By ducking the issue, the treaty makers effectively delegated to the judiciary the task of deciding, on a more particularized basis, whether to provide judicial remedies in specific types of cases. Ultimately, the "no judicial remedies" construction of the NSE declarations is untenable, because it is inconsistent with the treaty makers' tacit delegation of authority to the judicial branch. In contrast, the "no private right of action" concept is consistent with the treaty makers' intent, because it enables the judiciary to decide, on a more particularized basis, when to provide judicial remedies for violations of unique treaty rights.

The "no private right of action" construction of the NSE declarations gives ample guidance to the judiciary about how to proceed. Courts should not provide remedies in cases where plaintiffs seek to invoke the treaties to provide a private right of action because that would be inconsistent with the NSE declarations. However, in cases where plaintiffs invoke other remedial provisions of federal law to provide a cause of action for violations of unique treaty rights, the courts must examine the particular remedial provision to determine whether the right of action it provides is sufficiently broad to encompass suits for violations of unique treaty rights. Executive branch statements to the Senate indicating that the United States would rely

106. *See supra* note 98 and accompanying text.

107. *See supra* notes 96–97 and accompanying text.

108. The executive branch never stated this explicitly because any such explicit statement might have thwarted the overriding political purpose of the NSE declarations: to forestall conservative opposition to treaty ratification.

109. As noted above, some commentators have argued that courts should disregard the NSE declarations either because they are unconstitutional or because they are not legally binding. *See supra* notes 67–68 and accompanying text. This author's conclusion that courts cannot disregard the NSE declarations assumes (1) that the NSE declarations, construed in accordance with the "no private right of action" interpretation, are constitutional, and (2) that courts should apply the treaties in a manner that is consistent with the treaty makers' intent, as manifest in the NSE declarations, regardless of whether those declarations are legally binding. *See supra* notes 69–71 and accompanying text.

on other provisions of federal law to ensure compliance with its treaty obligations[110] support this overall approach.

The remainder of this Article assumes that the "no private right of action" concept is the best interpretation of the NSE declarations.[111] Part III analyzes particular federal statutes to determine whether, and to what extent, they provide an express right of action against government officers for violations of unique treaty rights. Part IV considers whether the doctrine associated with *Ex parte Young* provides an implied right of action for prospective relief against state and local government officers who commit violations of unique treaty rights.

III. EXPRESS STATUTORY RIGHTS OF ACTION AGAINST GOVERNMENT OFFICERS

Part III examines three federal statutes that could potentially provide plaintiffs a private right of action to obtain judicial remedies for violations of unique treaty rights by government officers: the Federal Tort Claims Act (FTCA)[112] the Administrative Procedure Act (APA),[113] and 42 U.S.C. § 1983.[114] The first three sections of Part III do not criticize current interpretations of these statutes, nor do they advocate changes to existing judicial doctrine. Rather, the first three sections analyze how these statutes,

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110. *See, e.g.*, Race Report, *supra* note 32, at 25 (stating that it is unnecessary to create new private cause of action because "existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention. Moreover, federal, state and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court.").

111. Part IV.D.3 distinguishes three different versions of the "no private right of action" concept, and considers the pros and cons of each version.

112. 28 U.S.C. § 1346(b)(1) (Supp. IV 1998) (establishing jurisdiction of federal courts for FTCA claims); 28 U.S.C. §§ 2671–2680 (1994) (establishing procedure for bringing FTCA claims).

113. 5 U.S.C. §§ 701–706 (1994).

114. 42 U.S.C. § 1983 (1994). There are other federal statutes that could also potentially provide plaintiffs a private right of action for violations of unique treaty rights by government officers. For example, a prisoner may obtain a writ of habeas corpus if "[h]e is in custody in violation of the Constitution or laws *or treaties* of the United States." 28 U.S.C. § 2241(c)(3) (1994) (emphasis added). The Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), may provide a right of action for aliens to sue U.S. officials who commit human rights treaty violations. *See infra* note 218. The Declaratory Judgment Act, 28 U.S.C. § 2201 (1994), may also provide a remedy in some cases. *See infra* note 377. It is beyond the scope of this Article to consider every possible federal statute that might provide a private cause of action for individual victims of human rights treaty violations. This Article focuses on the FTCA, the APA, and § 1983 because these are the three principal federal statutes available to U.S. citizens who seek a judicial remedy for unlawful conduct by government officers.

as currently interpreted, would apply to claims alleging human rights treaty violations by government officers.

The analysis shows, first, that the FTCA does not provide a cause of action for treaty violations per se, but that unique treaty rights could still affect the outcome of an FTCA suit by providing plaintiffs with a reply to a defense of official authority. Second, the APA does provide plaintiffs a private cause of action for injunctive relief against federal officers who violate their unique treaty rights. Third, § 1983 does not provide plaintiffs a cause of action against state or local officers who violate their unique treaty rights. The final section of Part III contends that, insofar as the APA provides a federal cause of action for injunctive relief against federal officers who violate treaty rights, there is no persuasive policy justification for denying plaintiffs a federal cause of action for injunctive relief against state and local officers who violate their unique treaty rights.

A. The Federal Tort Claims Act

The FTCA provides a right of action for plaintiffs to obtain money damages from the United States for torts committed by federal government officers.[115] The FTCA is the principal remedial mechanism available to plaintiffs who seek money damages for non-constitutional torts committed by federal officers; plaintiffs generally utilize actions for constitutional torts derived from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[116] In an FTCA action, the substantive law governing the defendant's liability is "the law of the place where the act or omission occurred."[117] Torts committed outside the United States are not actionable under the FTCA.[118] Thus, in FTCA suits, plaintiffs cannot raise international

115. *See generally* Shepard's Editorial Staff, *Civil Actions Against the United States, Its Agencies, Officers, and Employees* §§ 2.1–2.128 (2d ed. 1992) [hereinafter *Civil Actions*].

116. 403 U.S. 388 (1971). In *Bivens*, the U.S. Supreme Court recognized a cause of action for money damages against individual federal officers who violate a plaintiff's constitutional rights. *See generally* Erwin Chemerinsky, *Federal Jurisdiction* 567–89 (3d ed. 1999); Richard H. Fallon et al., *Hart & Wechsler's The Federal Courts and the Federal System* 849–77 (4th ed. 1996) [hereinafter Hart & Wechsler]. The *Bivens* cause of action is available only for constitutional torts. *See* Chemerinsky, *supra*, at 569. Therefore, plaintiffs cannot utilize *Bivens* actions to raise international human rights claims, as such. Of course, plaintiffs can raise analogous claims under *Bivens*, insofar as the alleged international human rights violation is also a constitutional violation.

117. 28 U.S.C. § 2672 (1994).

118. *See* 28 U.S.C. § 2680(k) (1994).

human rights claims per se, because courts must look to state tort law to determine liability.

Even so, there are cases in which human rights treaties could determine the outcome of an FTCA suit. Suppose that a male guard at an INS detention facility conducted a visual strip search of a female detainee.[119] In this hypothetical case, the female detainee brought an FTCA claim for invasion of privacy.[120] Since invasion of privacy is now a recognized tort in most states,[121] the male guard's conduct was probably tortious, disregarding defenses, under "the law of the place where the act or omission occurred."[122] Assume that the plaintiff complied with the various procedural requirements imposed by the FTCA.[123] The claim is not barred by the intentional tort exception to the FTCA.[124] Nor is it barred by the Prison Litigation Reform Act (PLRA),[125] because INS detainees are not "prisoners," as defined by the PLRA, unless they have been accused of a crime.[126]

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119. *See* Jama v. U.S. Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 359–60 (D.N.J. 1998) (involving suit by INS detainees who alleged, inter alia, that guards "performed strip searches and body cavity searches in a manner designed to degrade and humiliate plaintiffs").

120. A *Bivens* claim may or may not succeed in such a case. Courts have not specifically addressed the legality of cross-gender strip searches in INS facilities, but they have addressed the issue in the prison context. *See generally* Karoline E. Jackson, Note, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 Ind. L.J. 959 (1998). Judicial authority is divided on the issue, but at least some courts have indicated that allegations of cross-gender strip searches, without more, are insufficient to state a claim for a constitutional violation. *See* Peckham v. Wisconsin Dep't of Corrections, 141 F.3d 694, 697 (7th Cir. 1998) (upholding summary judgment for defendants where female prisoner was strip-searched by female guard in presence of male guard and stating that "it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment"); Johnson v. Phelan, 69 F.3d 144, 150 (7th Cir. 1995) (affirming dismissal for failure to state claim of lawsuit based on monitoring of naked male prisoners by female guards and stating that "[t]he fourth amendment does not protect privacy interests within prisons").

121. *See Restatement (Second) of Torts* § 652A cmt. a (1977) (stating that "a right of privacy is now recognized in the great majority of the American jurisdictions that have considered the question"); *id.* § 652B ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

122. 28 U.S.C. § 2672 (1994).

123. *See generally Civil Actions*, *supra* note 115, §§ 2.74–2.94.

124. 28 U.S.C. § 2680(h) (1994) (barring FTCA claims for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

125. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(e) (Supp. IV 1998) ("No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.").

126. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(h) (Supp. IV 1998) (defining "prisoner" to mean "any person incarcerated or detained in any facility who is accused of, convicted of,

A defendant would presumably claim official authority as a defense.[127] The plaintiff could then argue, in reply to the defense, that the male guard lacked authority to conduct the search, because cross-gender strip searches violate her treaty right under the ICCPR to "be treated with humanity and with respect for the inherent dignity of the human person."[128] If the court agreed with the plaintiff's interpretation of the treaty, then the ICCPR would effectively determine the outcome of the case. The plaintiff's invocation of the ICCPR in reply to a defense would not be inconsistent with the treaty makers' intent in adopting the NSE declarations, because the plaintiff would not be relying on the ICCPR to establish a private cause of action.

In short, plaintiffs cannot raise international human rights claims per se under the FTCA. Nevertheless, where a federal officer commits a violation of a unique treaty right, and where the officer's conduct is tortious under state tort law, plaintiffs may be able to utilize the FTCA to obtain a judicial remedy for the treaty violation by invoking the unique treaty right as a reply to a defense of official authority.

B. The Administrative Procedure Act

U.S. citizens who allege that federal officers have violated rights protected by human rights treaties, and who seek relief other than money damages, could bring a claim under the Administrative Procedure Act (APA).[129] The APA provides a cause of action for relief other than money damages for any "person suffering legal wrong because of agency action, or

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sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program").

127. A defendant might also argue that plaintiff's claim is barred because the male guard was "exercising due care, in the execution of a statute or regulation," or because he was performing a "discretionary function." 28 U.S.C. § 2680(a). This hypothetical assumes that these arguments would be rejected, although one or both of the arguments might succeed in some cases.

128. ICCPR, *supra* note 13, art. 10, ¶ 1. The legality of cross-gender strip searches under Article 10(1) is not altogether clear. However, the Human Rights Committee has criticized the United States for allowing "male prison officers access to women's detention centres," and has indicated that Article 10 of the ICCPR may require amendment of "[e]xisting legislation that allows male officers access to women's quarters." *See* U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg. ¶¶ 20, 34, U.N. Doc. CCPR/C/79/Add. 50 (1995); *see also* Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 Harv. Hum. Rts. J. 71, 111–14 (2000).

129. 5 U.S.C. §§ 701–706 (1994).

adversely affected or aggrieved by agency action within the meaning of a relevant statute."[130]

Consider a group of inmates in a federal maximum security prison who have been placed in solitary confinement for an indefinite period due to gang-related activity.[131] In this hypothetical case, the prisoners concede that their solitary confinement does not violate the Eighth Amendment,[132] but they seek declaratory and injunctive relief against prison officials under the APA, claiming that prolonged solitary confinement, under the conditions in U.S. maximum-security prisons, would be a violation of their treaty right to "be treated with humanity and with respect for the inherent dignity of the human person."[133] Assume that the prisoners exhausted their administrative remedies,[134] and that the Federal Bureau of Prisons issued an order constituting "final agency action,"[135] which denied the relief the prisoners sought. Insofar as they seek only declaratory and injunctive relief, and not money damages, their claim is not barred by the Prison Litigation Reform Act.[136]

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130. 5 U.S.C. § 702 (emphasis added); *see* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 230 n.4 (1986) (stating that APA creates private right of action).

131. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146, 1227–28 (N.D. Cal. 1995) (describing assignment of 600 inmates affiliated with prison gang to special security unit "indefinitely up to the maximum length of their sentence which, for some prisoners, may mean 10 or 15 years, or the duration of their life").

132. Although solitary confinement may, in some cases, be unconstitutional, U.S. courts have generally held "that the imposition of solitary confinement, without more, does not violate the Eighth Amendment." Michael B. Mushlin, *Rights of Prisoners* § 2.02 (2d ed. 1993).

133. ICCPR, *supra* note 13, art. 10, ¶ 1. Due to the stringent standards imposed under Article 10(1), *see supra* notes 59–63 and accompanying text, solitary confinement conditions that would pass constitutional muster might well be deemed a violation of U.S. treaty obligations. *See* U.N. GAOR, Hum. Rts. Comm., 53d Sess., 1413th mtg. ¶ 20, U.N. Doc. CCPR/C/79/Add. 50 (1995) (stating, in reference to practice of solitary confinement in United States, that "the conditions of detention in certain maximum security prisons . . . are incompatible with article 10 of the Covenant."); *see also* Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 Cal. W. Int'l L.J. 139, 155–60, 168 (1995) (describing practice of solitary confinement in super maximum-security prisons in United States, and concluding that "solitary confinement as used in the United States . . . [is] a violation of the international standards").

134. "A plaintiff generally must exhaust all prescribed administrative remedies before seeking judicial review of agency action under the Administrative Procedure Act." *Civil Actions*, *supra* note 115, § 6.26.

135. Agency action is subject to judicial review under the APA only if it is "made reviewable by statute" or if it is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1994). Since there is no statute that makes international human rights claims by U.S. citizens reviewable, plaintiffs who seek APA review must plead and prove "final agency action."

136. *See* 42 U.S.C. § 1997e(e) (Supp. IV 1998) ("No Federal civil action may be brought by a prisoner confined in jail, prison, or other correctional facility, for mental or emotional injury suffered

To state a claim under the APA, the prisoners must show, inter alia, that violation of a treaty right constitutes a "legal wrong" within the meaning of the APA.[137] A treaty is essentially equivalent to a federal statute.[138] Therefore, there are strong grounds for contending that violation of a treaty right also constitutes a legal wrong within the meaning of the APA. Although there is scant judicial authority directly on point, the few courts that have addressed the issue agree that a violation of a treaty right is a cognizable legal wrong under the APA.[139]

Assuming that violation of a treaty right constitutes a "legal wrong" within the meaning of the APA, there are three distinct arguments that the defendant prison officials in the preceding hypothetical might raise against

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while in custody without a prior showing of physical injury."). Every federal appellate court that has addressed the issue has concluded that this provision limits damages remedies, but does not impair a prisoner's right to seek declaratory or injunctive relief. *See infra* notes 476–74 and accompanying text.

137. 5 U.S.C. § 702 (1994) (referring to a "person suffering legal wrong because of agency action."). Alternatively, the hypothetical prisoners might argue that they are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. However, since the substantive law that they claim has been violated is a treaty, not a statute, the argument that they have suffered a "legal wrong" is more persuasive.

138. *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."). The statement that treaties and statutes are equivalent is often qualified by the caveat that the treaty must be self-executing. Although human rights treaties are not self-executing, in the sense that they do not create a private cause of action, they are still equivalent to statutes because they are the law of the land under the Supremacy Clause. *See supra* notes 75–79 and accompanying text.

139. *See* Sohappy v. Hodel, 911 F.2d 1312, 1316–20 (9th Cir. 1990) (reversing district court's grant of summary judgment in favor of defendants where Indian plaintiffs claimed that Bureau of Indian Affairs regulation was "invalid because it contradicts the 1855 treaties" and other laws); Makah Indian Tribe v. Verity, 910 F.2d 555, 557, 561 (9th Cir. 1990) (upholding judicial review under APA where Indian tribe challenged federal regulations that allegedly interfered with treaty-protected fishing rights); Rainbow Navigation, Inc. v. Department of Navy, 686 F. Supp. 354 (D.D.C. 1988) (granting preliminary injunction to U.S. company that raised APA claim that Navy procurement violated bilateral treaty between United States and Iceland); *see also* Vázquez, *supra* note 8, at 1148 ("[T]he APA has been read by the courts to authorize judicial review of federal agency action that allegedly violates a treaty.").

In *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498 (11th Cir. 1992), the Eleventh Circuit rejected an APA claim by Haitian refugees who alleged violations of Article 33 of the United Nations Protocol Relating to the Status of Refugees. The Court held that judicial review was unavailable under the APA, *see id.* at 1505–09, because "statutes preclude judicial review" and because the challenged action was "committed to agency discretion by law." *Id.* at 1505 (quoting 5 U.S.C. § 701(a)(1), (2) (1994)). However, the court's opinion is consistent with the proposition that a violation of Article 33 is a "legal wrong" within the meaning of the APA. *See* Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 Geo. Immigr. L.J. 39, 64 (1993) ("Because Article 33 is the law of the land, agency action that violates that provision inflicts a 'legal wrong' and entitles persons 'adversely affected or aggrieved by such action' to judicial review thereof.").

judicial review of the prisoners' claims under the APA: (1) the NSE declarations preclude judicial review,[140] (2) agency action is committed to agency discretion by law,[141] or (3) the prisoners are not within the zone of interests protected by the treaty.[142]

1. Non-Self-Executing Declarations Do Not Preclude Judicial Review

Judicial review of agency action is prohibited under the APA if "statutes preclude judicial review."[143] Defendants might argue that the NSE declarations are part of the treaties, that they are therefore legally equivalent to a statute, and that they manifest the treaty makers' intent to preclude judicial review of alleged violations of unique treaty rights. There are two distinct problems with such arguments. First, several commentators have noted that the NSE declarations are not part of the treaties and therefore do not have the force of law.[144] Second, even assuming that the NSE declarations do have the force of law, they do not manifest an intention to preclude judicial review of alleged violations of unique treaty rights.

In evaluating claims under the APA, there is a "strong presumption that Congress intends judicial review of administrative action."[145] When it adopted the APA, the House Judiciary Committee said that, to preclude judicial review under the APA, "a statute, if not specific in withholding such review, must upon its face give *clear and convincing evidence* of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."[146] The Senate record provides clear and convincing evidence that the NSE declarations were intended to preclude reliance on the treaties to establish a private right of action.[147] But careful review of the Senate record associated with treaty ratification shows that the NSE declarations were not intended

140. *See infra* notes 143–50 and accompanying text.

141. *See infra* notes 151–60 and accompanying text.

142. *See infra* notes 161–66 and accompanying text.

143. 5 U.S.C. § 701(a)(1) (1994).

144. *See supra* note 68.

145. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986).

146. H.R. Rep. No. 79-1980, at 41 (1946) (emphasis added).

147. *See supra* note 85. That the treaties do not create a private right of action cannot, without more, preclude judicial review under the APA. Plaintiffs routinely rely upon the APA to provide a remedy for violations of rights founded upon federal statutes that do not, themselves, create a private right of action. *See* 5 U.S.C. § 704 (1994) (authorizing judicial review of "final agency action for which there is no other adequate remedy").

as a complete bar to judicial review of alleged violations of unique treaty rights.[148] At a minimum, the ostensible evidence that the NSE declarations were intended to preclude judicial review is not sufficiently clear and convincing to overcome the presumption in favor of judicial review.[149]

Apart from the NSE declarations, there are no other "statutes [that] preclude judicial review"[150] of the hypothetical prisoners' APA claim for relief from solitary confinement. Therefore, the hypothetical defendants' argument that "statutes preclude judicial review" should be rejected.

2. *Committed to Agency Discretion by Law*

Section 701(a)(2) of the APA precludes judicial review of agency action that "is committed to agency discretion by law."[151] This provision has been construed, for example, to preclude judicial review under the APA of an agency decision not to institute an enforcement proceeding.[152] Thus, despite the U.S. treaty obligation to prosecute individuals who commit acts of torture,[153] a federal prosecutor's decision not to prosecute an alleged torturer would not be subject to judicial review, because that decision is committed to agency discretion by law.

The U.S. Supreme Court has construed § 701(a)(2) to bar judicial review "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[154] The defendants in the preceding hypothetical might argue that implementation of the treaty obligation to treat prisoners "with humanity and with respect for the inherent dignity of the human person"[155] is "committed to agency discretion by law," because

148. *See supra* notes 96–103 and accompanying text.

149. Litigants opposed to judicial review under the APA could certainly find isolated statements in the Senate record suggesting that the treaty makers intended, by means of the NSE declarations, to preclude judicial review of treaty-based human rights claims. However, the Senate record, viewed as a whole, suggests that the treaty makers did not intend to preclude judicial review of alleged violations of unique treaty rights. *See supra* notes 96–103 and accompanying text.

150. 5 U.S.C. § 701(a)(1) (1994).

151. 5 U.S.C. § 701(a)(2) (1994).

152. *See* Heckler v. Chaney, 470 U.S. 821, 828–31 (1985) (holding that decision by Food and Drug Administration (FDA) not to undertake enforcement actions to prevent alleged violations of Federal Food, Drug, and Cosmetic Act was committed to agency discretion by law).

153. *See* Torture Convention, *supra* note 14, art. 7.

154. Webster v. Doe, 486 U.S. 592, 599 (1988) (quoting S. Rep. No. 79-752, at 26 (1945)); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (same).

155. ICCPR, *supra* note 13, art. 10, ¶ 1.

the treaty provision is drawn in such broad terms that there is "no law to apply." This argument is not persuasive. There are dozens of cases in which the U.N. Human Rights Committee has found violations of the Article 10(1) obligation to treat prisoners with humanity and respect for their dignity.[156] These include several cases where the violation was based upon conditions in solitary confinement.[157] Hence, the law to apply to the prisoners' claims in the preceding hypothetical includes not only Article 10(1), which is admittedly vague, but also the Human Rights Committee's decisions interpreting that article, which help clarify the scope of the obligation.[158] Because there is law to apply, placing the hypothetical prisoners in solitary confinement is not an action committed to agency discretion by law, and is therefore subject to judicial review.

The defendants in the preceding hypothetical might argue that judicial review is prohibited because responsibility for ensuring U.S. compliance with its human rights treaty obligations is primarily an executive branch function, which is committed to agency discretion by law. Granted, separation of powers principles support the notion that treaty compliance is, first and foremost, an executive branch responsibility. However, the treaties themselves do not grant the executive branch sole responsibility for ensuring treaty compliance. To the contrary, the treaties envision a role for the judiciary in ensuring that individuals who allege violations of their treaty rights have an opportunity to be heard.[159] Apart from the treaties, there is no law that commits responsibility for treaty compliance exclusively to the executive branch.[160] Therefore, it is untenable to claim, as a general

156. *See* Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 186–87 (1993) (citing cases).

157. *See id.*; *see also* Miller, *supra* note 133, at 152–54.

158. Lower federal courts have recognized the Committee's decisions as a source of persuasive authority for interpreting the ICCPR. *See* United States v. Duarte-Acero, 208 F.3d 1282, 1287–88 (11th Cir. 2000); Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999).

159. *See* Torture Convention, *supra* note 14, art. 13 (obligating parties to "ensure that any individual who alleges he has been subjected to torture . . . has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities"); ICCPR, *supra* note 13, art. 2, ¶ (3)(b) (obligating parties to "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities . . . and to develop the possibilities of judicial remedy").

160. Indeed, the Constitution specifically provides that "[t]he judicial power shall extend to all Cases . . . arising under . . . Treaties made" under the authority of the Constitution. U.S. Const. art. III, § 2, cl. 2. Although human rights treaties do not create the cause of action for treaty-based human rights claims brought pursuant to the APA, *see* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."), human rights claims brought pursuant to the APA do "arise under" the treaties in a broader constitutional sense, *see* Osborn v.

proposition, that agency action to ensure treaty compliance is "committed to agency discretion by law."

3. *Zone of Interests*

To establish standing to sue under the APA, plaintiffs must show that they are arguably within the zone of interests protected by the statute (or treaty) establishing the rights they seek to vindicate.[161] Defendants in the preceding hypothetical might argue that the federal prisoners are not within the zone of interests protected by the ICCPR because the United States ratified the treaty to advance its foreign policy interests, not to augment protection for the rights of U.S. citizens. There is no doubt that the primary rationale offered in favor of U.S. ratification of the human rights treaties related to U.S. foreign policy interests.[162] Moreover, as noted above, the executive branch "sold" the treaties to the Senate, in part, by assuring the Senate that the treaties would not have any impact on domestic law.[163]

Even so, the prisoners in the above hypothetical have standing to sue under the APA:

> [The zone-of-interest test] denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be

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Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that claims "arise under" federal law, for constitutional purposes, whenever federal law "forms an ingredient of the original cause"). Therefore, the contention that treaty compliance is exclusively an executive branch function is contrary to Article III.

161. *See, e.g.*, National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488 (1998) ("For a plaintiff to have prudential standing under the APA, 'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the . . . statute in question.'") (quoting Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970)); Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517, 523 (1991); Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 395–96 (1987).

162. *See* ICCPR Report, *supra* note 30, at 25 (stating, in letter from President Bush to Senator Pell, that U.S. ratification of ICCPR would "strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world").

163. *See supra* notes 50, 51, 96–97 and accompanying text.

> especially demanding; *in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.*[164]

In short, to satisfy the zone-of-interests test, the hypothetical prisoners need not show that they were intended beneficiaries of the ICCPR. They need only show that their interests are not "marginally related to or inconsistent with the purposes implicit" in the ICCPR.[165] That criterion is easily satisfied, because the treaty drafters established a specific right for individuals, like the hypothetical prisoners, to "be treated with humanity and with respect for the inherent dignity of the human person."[166] Moreover, those who ratified the treaty intended that this right would be fully protected, as evidenced by the fact that they did not adopt a reservation for Article 10(1).[167] Since their claims are not marginally related to or inconsistent with the purposes implicit in the ICCPR, the prisoners in the above hypothetical have standing to sue under the zone-of-interests test.

The Ninth Circuit's recent decision in *Cornejo-Barreto v. Seifert*[168] supports the conclusion that the APA provides a right of action against federal officers for violations of unique treaty rights. During an extradition proceeding, Cornejo-Barreto introduced evidence that he would likely be tortured if he was extradited to Mexico.[169] He argued, therefore, that extradition would violate Article 3 of the Torture Convention, which obligates the United States not to extradite anyone to a country where he is likely to be tortured.[170] Congress enacted implementing legislation for Article 3 in 1998 under the Foreign Affairs Reform and Restructuring Act (FARR Act).[171] The legislation directed "appropriate agencies" to prescribe

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164. *Clarke*, 479 U.S. at 399–400 (emphasis added); *see also National Credit Union Admin.*, 522 U.S. at 488–92 (emphasizing that it is not necessary to establish legislative intent to benefit plaintiff in order to pass zone-of-interests test); *id.* at 505 (O'Connor, J., dissenting) (arguing that, under majority's approach, "every litigant who establishes injury in fact under Article III will automatically satisfy the zone-of-interests requirement").

165. *See National Credit Union Admin.*, 522 U.S. at 505.

166. ICCPR, *supra* note 13, art. 10, ¶ 1.

167. As a general matter, the treaty makers intended for the United States to comply with all provisions for which reservations were not adopted. *See* Sloss, *supra* note 19, at 178–83.

168. 218 F.3d 1004 (9th Cir. 2000).

169. *See id.* at 1007–08.

170. *See* Torture Convention, *supra* note 14, art. 3.

171. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 [hereinafter FARR Act] (codified in scattered sections of 8 U.S.C. and 22 U.S.C.).

implementing regulations.[172] In 1999, the Secretary of State published the requisite regulations concerning Article 3's anti-extradition provision.[173]

The FARR Act specifically states that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention."[174] The regulations state explicitly that "[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review."[175] Even so, the Ninth Circuit held that the APA "allows an individual facing extradition who is making a torture claim to petition . . . for [judicial] review of the Secretary of State's decision to surrender him."[176] The court reasoned that, although the FARR Act "prohibits courts from reading an implied cause of action into the statute," the Act does not bar judicial review under the APA, because "we can look to existing jurisdictional statutes to entertain a petition for review under the APA."[177] The Court held the implementing regulation invalid insofar as it purported to bar judicial review, concluding that denial of judicial review "would be contrary to both the statute and the Convention."[178]

Finally, the Court ruled that the NSE declaration was irrelevant in light of the implementing legislation.[179] Implicit in this conclusion is a rejection of the "no judicial remedies" interpretation of the NSE declaration. If the NSE declaration is understood to preclude judicial remedies for violations of the Torture Convention (absent implementing legislation), and Congress enacts legislation that does not itself provide a judicial remedy, then the NSE declaration would continue to bar judicial remedies, assuming it is legally valid. Thus, the court's conclusion that the APA authorizes judicial review of the Secretary of State's decision to extradite necessarily implies that the NSE declaration is not a complete bar to judicial remedies for violations of treaty rights.

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172. Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822.

173. *See* 22 C.F.R. § 95 (1999).

174. Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822.

175. 22 C.F.R. § 95.4.

176. Cornejo-Barreto v. Seifert, 218 F.3d 1004, 1007 (2000).

177. *Id.* at 1015.

178. *Id.* at 1014.

179. *See id.* at 1011 n.6 ("Because Congress passed legislation implementing Article 3 of the torture convention in the extradition context, we need not reach the issue of whether that provision of the treaty is self-executing.").

In sum, the APA provides U.S. citizens a right of action against federal officers for relief other than money damages for violations of unique treaty rights. A violation of a unique treaty right is a "legal wrong" within the meaning of the APA. The NSE declarations do not preclude judicial review of agency action that violates unique treaty rights. In certain cases, such agency action may be committed to agency discretion by law, but there are potential cases, such as the preceding hypothetical, in which agency action is not committed to agency discretion by law. Finally, at least some plaintiffs whose unique treaty rights are violated are arguably within the zone of interests protected by the human rights treaties.

C. Section 1983

Under 42 U.S.C. § 1983, plaintiffs have a right of action for money damages and specific relief against state and local government officers who deprive individuals "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[180] The U.S. Supreme Court has held that § 1983 provides a right of action not only for violations of federal constitutional rights, but also for violations of federal statutory rights.[181] In so holding, the Court has emphasized that § 1983 "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[182]

Treaty rights are federally protected rights, and treaties are supreme federal law, equivalent to federal statutes.[183] Therefore, there are grounds for construing the term "laws" in § 1983 to permit a remedy for violations of at least some treaty rights.[184] Although the U.S. Supreme Court has not addressed this issue,[185] decisions by lower federal appellate courts are

180. 42 U.S.C. § 1983 (1994).

181. *See* Livadas v. Bradshaw, 512 U.S. 107, 132 (1994); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508–10 (1990); Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 105 (1989); Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987); Maine v. Thiboutot, 448 U.S. 1, 4–8 (1980).

182. *Thiboutot*, 448 U.S. at 4–5 (quoting Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 700–01 (1978)).

183. *See supra* note 138 and accompanying text.

184. *See* Vázquez, *supra* note 8, at 1146–47 & n.272 (contending that § 1983 confers right of action for violations of treaty-based rights).

185. *Breard v. Greene*, 523 U.S. 371 (1998), provides indirect support for the proposition that some treaty rights are enforceable under § 1983. In *Breard*, the Consul General of Paraguay brought a § 1983 claim to enforce treaty rights. *See id.* at 374. The district court rejected defendants' motion to dismiss that claim, concluding that the Consul General had standing to bring his claim. *See* Republic of Paraguay

consistent with the view that § 1983 provides remedies for violations of at least some treaty rights.[186]

Not all federal laws, though, create rights that are enforceable under § 1983. The U.S. Supreme Court has recognized two exceptions to the general rule that § 1983 provides a remedy for violations of federal statutory rights. First, § 1983 may not be used to remedy federal statutory violations "where Congress has foreclosed such enforcement of the statute in the enactment itself."[187] Second, § 1983 does not provide a remedy for violations of federal statutes "where the statute did not create enforceable rights, privileges or immunities within the meaning of Sec. 1983."[188] Assuming that § 1983 provides a remedy for violations of at least some treaty rights, and assuming that these two exceptions apply to treaties as well as statutes, one must inquire whether either of these exceptions would preclude reliance on § 1983 as a remedy for violations of human rights treaties.

1. Did the Senate Foreclose Enforcement of Human Rights Treaties?

Congress may foreclose a remedy under § 1983 either "expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[189] There is no express provision in any of the human rights treaties ratified by the United States, or in the Senate

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v. Allen, 949 F. Supp. 1269, 1274–75 (E.D.Va. 1996). The U.S. Supreme Court disagreed on the narrow ground that neither Paraguay nor its Consul General is a "person as that term is used in § 1983." *Breard*, 523 U.S. at 378. Notably, the U.S. Supreme Court did not adopt the position that § 1983 is inapplicable to treaty rights.

186. *See, e.g.*, Romero v. Kitsap County, 931 F.2d 624, 627 n.5 (9th Cir. 1991) (stating that deprivations of treaty-based rights are cognizable under § 1983 in "specified circumstances"); United States v. Washington, 813 F.2d 1020, 1023 (9th Cir. 1987) ("If the State of Washington violates these now known and well-delineated [treaty] rights, [then that] might give rise to a section 1983 action."); Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho, 42 F.3d 1278, 1284 (9th Cir. 1994) (stating that claim of damages for violation of treaty rights may be pursued under § 1983). *But see* Hoopa Valley Tribe v. Nevins, 881 F.2d 657, 662–63 (9th Cir. 1989) (rejecting treaty-based claim brought under § 1983); United States v. Washington, 873 F.2d 240, 241–42 (9th Cir. 1989) (same).

187. Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987).

188. *Id.*; *accord* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997); Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 508 (1990); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105–07 (1989).

189. *Blessing*, 520 U.S. at 341; *see also* Livadas v. Bradshaw, 512 U.S. 107, 133 (1994); *Golden State Transit*, 493 U.S. at 106.

resolution of ratification for those treaties,[190] that forbids recourse to § 1983. Nor did the United States enact, incident to treaty ratification, a comprehensive enforcement scheme that is incompatible with enforcement under § 1983.[191] To the contrary, the executive branch told the Senate that it intended to rely on other provisions of federal law, including § 1983, to ensure enforcement of treaty-based rights,[192] and the Senate consented to ratification on that basis. Therefore, the political branches did not foreclose a remedy under § 1983 for violations of rights protected under human rights treaties.[193]

2. *Do the Treaties Create Enforceable Rights?*

The U.S. Supreme Court has considered three factors in assessing whether a statute creates enforceable rights, privileges or immunities within the meaning of § 1983:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.[194]

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190. *See* 140 Cong. Rec. 14,326-27 (1994) (Race Convention); 138 Cong. Rec. 8070-71 (1992) (ICCPR); 136 Cong. Rec. 36,192-93 (1990) (Torture Convention).

191. The United States did not adopt any implementing legislation for the ICCPR or the Race Convention. It did enact implementing legislation for the Torture Convention, but that legislation was essentially designed to implement one portion of one article of the Convention. *See supra* note 76.

192. *See* Race Report, *supra* note 32, at 15–17 (citing § 1983 and other statutes in support of proposition that existing federal law already provides remedies for treaty violations); *id.* at 14 (stating that "no new implementing legislation is considered necessary to give effect to the Convention" because "[e]xisting U.S. constitutional and statutory law and practice provide broad and effective protections against and remedies for" treaty violations).

193. The test for whether Congress, or in this case the treaty makers, foreclosed a remedy under § 1983 is similar to the test under section 701(a)(1) of the APA as to whether statutes preclude judicial review. *See supra* notes 143–150 and accompanying text. Other commentators have noted this similarity. *See, e.g.*, Monaghan, *supra* note 6, at 253–60 (comparing § 1983 with APA). Thus, having concluded above that statutes do not preclude judicial review under the APA, the conclusion that the treaty makers did not foreclose a remedy under § 1983 should not be surprising.

194. *Blessing*, 520 U.S. at 340–41 (quoting *Wright*, 431 U.S. at 432); *see also* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509 (1990); *Golden State Transit*, 493 U.S. at 106.

To determine how these factors apply to human rights treaties, it is helpful to consider a concrete example.

On August 3, 1982, Atlanta police officers arrested Michael Hardwick for engaging in consensual sexual activities with another adult male in the privacy of his own home.[195] The U.S. Supreme Court held that the Constitution does not protect the right of adult homosexuals to engage in private consensual sexual activity.[196] Suppose that state officers arrested Michael Hardwick in 1999 for engaging in private consensual sexual activities. In this hypothetical case, Hardwick filed a § 1983 suit against various state and local government officials, seeking money damages for the violation of his right to privacy, which is protected under Article 17 of the ICCPR.[197] Does Article 17 create enforceable rights, privileges, or immunities within the meaning of § 1983?

Article 17 is not "so vague and amorphous that its enforcement would strain judicial competence."[198] It states explicitly: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . ."[199] At least with respect to the right to privacy, this is far less "vague and amorphous" than the Due Process Clause, which has formed the basis for some privacy rights under the U.S. Constitution.[200] The Human Rights Committee has had little difficulty applying Article 17 to specific cases it has adjudicated.[201] The European Court of Human Rights has frequently applied a very similar provision in the European Convention on Human Rights to resolve specific

195. *See* Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

196. *See Bowers*, 478 U.S. at 190–96.

197. As noted above, the Human Rights Committee has held that state sodomy laws violate the Article 17 right to privacy. *See supra* notes 53–58 and accompanying text. The Committee's interpretation of Article 17 is persuasive authority, but is not binding on U.S. courts. *See supra* note 55.

198. *Blessing*, 520 U.S. at 340–41. Note that the § 1983 test for determining whether a right allegedly protected by a statute is "so 'vague and amorphous' that its enforcement would strain judicial competence", *id.* (quoting *Wright*, 431 U.S. at 430), is similar to the APA test for determining whether a statute is "'drawn in such broad terms that . . . there is no law to apply,'" Webster v. Doe, 486 U.S. 592, 599 (1988) (quoting S. Rep. No. 79-752, at 26 (1945)); *see also supra* notes 154–57 and accompanying text.

199. ICCPR, *supra* note 13, art. 17.

200. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973).

201. *See* Nowak, *supra* note 156, at 294–99 (summarizing cases decided by Human Rights Committee under Article 17).

controversies.[202] One would have to have an exceedingly low opinion of the U.S. judiciary to claim that enforcement of Article 17 would "strain judicial competence."

Article 17 also imposes binding obligations on the states. Article 17, like many human rights treaty provisions, is "couched in mandatory rather than precatory terms."[203] Moreover, the ICCPR provides explicitly that "[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."[204] The United States did not adopt a reservation for this provision. Rather, it adopted a so-called "understanding," stating that "this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[205] Thus, the treaty makers stated explicitly that the Covenant shall be implemented by state and local governments. Moreover, the fact that the condition is labeled an "understanding" rather than a "reservation" is significant because "reservations" are intended to modify treaty obligations, whereas "understandings" do not alter a party's legal obligations under the treaty.[206] Because the Covenant, by its terms, extends to all parts of federal states without limitation, and since the United States did not modify this obligation, Article 17 imposes binding obligations on the states.

The third criterion—intent to benefit the plaintiff—is more problematic. Some commentators have equated the intended-beneficiary test under

202. *See* 1 Peter Kempees, *A Systematic Guide to the Case-Law of the European Court of Human Rights* 507–566 (1996) (collecting excerpts of decisions by European Court applying Article 8 section 1 of European Convention, which protects right to privacy).

203. *Blessing*, 520 U.S. at 340–41 (citations omitted).

204. ICCPR, *supra* note 13, art. 50.

205. 138 Cong. Rec. 8070-71 (1992)

206. *See supra* note 41. The Reagan and Bush Administrations both proposed a federalism reservation to the Torture Convention. *See* Torture Report, *supra* note 28, at 7–8, 11–13. However, the Senate designated the proposed condition as an understanding, *see* 136 Cong. Rec. 36,192–93 (1990), apparently to clarify that the condition did not modify the United States's international legal obligations under the Convention. Subsequently, the Bush Administration proposed a federalism "understanding" for the ICCPR, *see* ICCPR Report, *supra* note 30, at 17–18, and the Clinton Administration proposed a similar federalism understanding for the Race Convention, *see* Race Report, *supra* note 32, at 8. The Senate consented to both proposed understandings. *See* 138 Cong. Rec. 8070–71 (1992); 140 Cong. Rec. 14,326–27 (1994). The decision to label these conditions understandings suggests that the treaty makers accepted the principle that the treaties would apply to the states.

§ 1983 with the APA zone-of-interests test.[207] The U.S. Supreme Court, though, has stated explicitly that a plaintiff need not be an intended beneficiary of a statute to satisfy the zone-of-interests test under the APA.[208] In contrast, the Court has consistently held that one must be an intended beneficiary to bring a federal statutory claim pursuant to § 1983.[209] The intended beneficiary test under § 1983 is different from the test for implied rights of action under the *Cort v. Ash* line of cases,[210] because the plaintiff who asserts a federal statutory claim under § 1983 need not show that Congress intended to create a private right of action when it enacted the statute. However, the U.S. Supreme Court has insisted that plaintiffs who seek § 1983 remedies for violations of federal statutory rights must produce affirmative evidence that Congress intended the statutory provision at issue to benefit the plaintiff.[211]

Applying the same approach in the context of human rights treaties, it is clear that no individual person qualifies as an intended beneficiary of the treaties. When they ratified the human rights treaties, the treaty makers believed that the rights specified in the treaties, as modified by U.S. reservations, would be accorded to all U.S. citizens because they believed that U.S. citizens already had those rights under pre-existing domestic law.[212] Thus, the treaty makers had a general intent that the rights of U.S. citizens, as specified in the treaties, would be protected. On the other hand,

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207. *See* Monaghan, *supra* note 6, at 254 (stating that APA "zone of interests" test is "substantially parallel" to § 1983 requirement that "plaintiff must establish the existence of a duty of which she is an intended beneficiary").

208. *See supra* note 164 and accompanying text.

209. *See* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997); Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 509 (1990); Golden State Transit Corp. v. City of L.A., 493 U.S. 103, 106 (1989); Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 430 (1987). One could argue that the U.S. Supreme Court's interpretation is misguided, because the requirements under § 1983 and the APA should be substantially parallel. However, this Article contends below that the differences between the APA and § 1983 can be justified on the grounds that § 1983 provides both money damages and injunctive relief, whereas the APA provides only injunctive relief. *See infra* notes 436–39 and accompanying text.

210. *See infra* notes 412–25 and accompanying text.

211. *See, e.g.*, *Blessing*, 520 U.S. at 343 ("[T]he requirement that a State operate its child support program in 'substantial compliance' with Title IV-D was not intended to benefit individual children and custodial parents, and therefore it does not constitute a federal right.").

212. *See, e.g.*, ICCPR Hearing, *supra* note 78, at 7 (statement of Richard Schifter, Assistant Secretary of State for Human Rights and Humanitarian Affairs) ("Our adherence to the Covenant will bring no fundamental changes to the enjoyment of individual human rights by all Americans. Our basic human rights are secure in America, through the incorporation of the Bill of Rights, and other provisions of the Constitution of the United States, as well as our State consitutions.").

the political branches did not intend, by means of ratification, to accord anyone any protection that was not already available under other provisions of domestic law.[213] Indeed, the central purpose of the U.S. reservations was to ensure that the treaties would not accord U.S. citizens any greater protection than pre-existing domestic law.[214] Therefore, under current U.S. Supreme Court jurisprudence, § 1983 does not provide plaintiffs a right of action against state or local government officers who commit violations of unique treaty rights, because the right of action extends only to the intended beneficiaries of a statute or treaty, and there are no intended beneficiaries of the human rights treaties that the United States ratified.[215]

D. Policy Considerations

The preceding sections have shown that plaintiffs whose unique treaty rights are violated by federal government officers can potentially obtain judicial remedies under either the FTCA (for money damages) or the APA (for relief other than money damages). In contrast, plaintiffs whose unique treaty rights are violated by state or local government officers cannot obtain judicial remedies under § 1983, either for money damages or for specific relief. Is there any valid policy justification for this asymmetry?

First, it is important to emphasize that the majority of the substantive rights protected by human rights treaties are redundant rights, not unique treaty rights. Because redundant rights are, by definition, protected by other provisions of federal constitutional or statutory law, plaintiffs whose redundant treaty rights are violated by state or local government officers can obtain judicial remedies under § 1983 by establishing violations of their constitutional or statutory rights. Therefore, the asymmetry noted above affects only unique treaty rights, not redundant rights.

Second, claims for money damages that can be asserted against federal officers in federal court under the FTCA can be brought as state tort claims

213. The main justification offered for ratification was a foreign policy rationale, not a domestic policy rationale. *See supra* note 162 and accompanying text.

214. *See supra* note 47 and accompanying text.

215. If one focuses on the intent of the treaty drafters, then there are numerous intended beneficiaries of the treaties. However, for the reasons stated above, the President and the Senate, when they agreed to ratify the human rights treaties, did not manifest an affirmative intent to benefit any particular class of potential plaintiffs in the United States. This Article assumes that, in the event of a conflict between the intent of the treaty drafters, and the intent of the treaty ratifiers, the intent of the ratifiers controls the domestic judicial application of the treaties.

against state and local government officers in state court.[216] Moreover, just as unique treaty rights can be enforced under the FTCA by raising them in reply to a defense of official authority,[217] unique treaty rights can also be enforced in a state tort case by raising them in reply to a defense of official authority. Thus, with respect to money damages, the asymmetry between claims against federal officers and claims against state and local officers is entirely procedural, not substantive: claims against federal officers can be asserted in federal court, whereas claims against state and local government officers must be brought in state court. This procedural asymmetry is not especially problematic.[218] It appears to strike a reasonable accommodation between (a) Congress's insistence that claims for money damages for torts committed by federal officers must be brought in federal court;[219] and (b) respect for state sovereignty, which has traditionally meant, inter alia, that state tort claims against state and local government officers are brought in state courts.[220]

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216. Recall that state tort law provides the underlying cause of action for an FTCA claim. *See supra* notes 115–18 and accompanying text. Hence, any claim that could be asserted against a federal officer under the FTCA could also be asserted against a state officer under state tort law. On the other hand, an alleged treaty violation that did not constitute a tort under the law of the relevant state would not provide the basis of a claim for money damages against either state or federal officers.

217. *See supra* notes 119–28 and accompanying text.

218. What is potentially more problematic is a possible disparity between damages remedies available to U.S. citizens and damages remedies available to aliens. *See* Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 Chi. J. Int'l L. (forthcoming fall 2000) (manuscript on file with author). There may be conduct by government officers that violates unique treaty rights, but that does not constitute a tort under state tort law. There is no apparent remedial mechanism that would enable U.S. citizens to obtain money damages for actions by federal, state, or local government officers that violate unique treaty rights, but that are not tortious under state law. In contrast, the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1994), may provide aliens a right of action for money damages against federal, state, and local government officers who commit violations of unique treaty rights, regardless of whether their conduct is tortious under state law. *See* Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 104–08 (1996) (discussing claims against U.S. officers under ATCA); *see also* Jama v. U.S. Immigration & Naturalization Serv., 22 F. Supp. 2d 353, 362–63 (D.N.J. 1998) (noting that ATCA provides aliens right of action for money damages against INS contractors who commit international human rights violations). This possible disparity between judicial remedies available to aliens and judicial remedies available to U.S. citizens is the subject of a current work in progress by this author.

219. *See* 28 U.S.C. § 2679(b)(1) (1994) (stating that FTCA remedy is exclusive remedy for injury "arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment").

220. Of course, state tort claims can be brought in federal court under diversity jurisdiction. But state tort claims against state and local officers do not create federal question jurisdiction.

With respect to claims for specific relief, though, the asymmetry between suits against federal officers and suits against state and local officers is more problematic. As an initial matter, all fifty states may not have remedial mechanisms comparable to the APA that provide plaintiffs a state law cause of action for specific relief against state and local government officers who violate their unique treaty rights. Moreover, even assuming the availability of such remedial mechanisms in all fifty states, there are three reasons why plaintiffs should have access to federal court in cases where they seek injunctive relief against state and local officers who violate federal law. First, the general equitable powers of federal courts have traditionally been understood to include the power to grant specific relief against state and local officers who violate federal law.[221] Second, federal jurisdiction is necessary to promote the federal interest in ensuring U.S. compliance with its treaty obligations.[222] Third, under the doctrine of *Ex parte Young*,[223] the U.S. Supreme Court has long recognized that, when plaintiffs seek prospective relief for ongoing violations of federal law by state officers, federal jurisdiction is needed to vindicate the federal interest in the supremacy of federal law.[224]

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221. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 21–29 (1963); *see also infra* note 349.

222. The ICCPR, the Race Covention, and the Torture Convention obligate parties to provide an effective remedy for any person whose treaty rights are violated. *See* Torture Convention, *supra* note 14, art. 13 (obligating parties to "ensure that any individual who alleges he has been subjected to torture . . . has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities"); Race Convention, *supra* note 15, art. 6 (obligating parties to "assure to everyone within their jurisdiction effective protection and remedies . . . against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention"); ICCPR, *supra* note 13, art. 2, ¶ 3(a) (obligating parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy"). Therefore, failure to provide prospective relief for a victim of an ongoing violation of a unique treaty right would be a breach of the United States's international legal obligations.

In contrast, failure to provide compensatory damages to a past victim of a treaty violation would not necessarily be a breach of the United States's international legal obligations, because the treaties do not obligate parties, as a general matter, to provide compensatory damages for all violations. Rather, the ICCPR and the Torture Convention impose specific requirements to provide compensatory damages for certain types of violations. *See, e.g.*, ICCPR, *supra* note 13, art. 9, ¶ 5 ("Anyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation"); Torture Convention, *supra* note 14, arts. 14 & 16 (noting that right to compensation applies to victims of torture, but not to victims of other acts of cruel, inhuman, or degrading treatment or punishment). The Race Convention, though, does appear to impose a general obligation to provide compensatory damages for past treaty violations. *See* Race Convention, *supra* note 15, art. 6 (requiring "just and adequate reparation or satisfaction for any damage suffered as a result of" a treaty violation).

223. 209 U.S. 123 (1908).

224. *See infra* note 244 and accompanying text.

Part IV considers whether an individual whose unique treaty rights are violated by a state officer has an implied federal cause of action for injunctive relief against that officer under the *Ex parte Young* doctrine. If so, the aforementioned asymmetry between suits for injunctive relief against federal officers and suits for injunctive relief against state officers would, as a practical matter, be irrelevant, because plaintiffs could obtain injunctive relief against state officers who violate their unique treaty rights by bringing an *Ex parte Young* action.

IV. *EX PARTE YOUNG* AND TREATY-BASED PREEMPTION CLAIMS

The doctrine of *Ex parte Young*[225] is commonly described as an exception to the Eleventh Amendment.[226] However, the *Young* doctrine is also a basic principle of federal jurisdiction, which authorizes federal courts to adjudicate private suits against state government officers to enjoin threatened or ongoing violations of federal law.[227]

In *Shaw v. Delta Airlines, Inc.*,[228] the U.S. Supreme Court extended the *Young* jurisdictional principle to include statutory preemption claims[229]—in other words, private suits against state government officers to enjoin enforcement of state laws that are allegedly preempted by federal statutes. *Shaw* is similar to *Young* in that both cases involved private suits for injunctive relief against state officers. *Shaw* differs from *Young*, though, in two key respects. First, the substantive law at issue in *Shaw* was a federal

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225. 209 U.S. 123 (1908).

226. *See, e.g.*, Chemerinsky, *supra* note 116, at 412.

227. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 293–94 (1997) (O'Connor, J., concurring) ("We have frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights. . . . [O]ur modern *Young* cases . . . establish . . . that a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*.").

228. 463 U.S. 85 (1983).

229. The court stated,

> [i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *Ex parte* Young, 209 U.S. 123 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Young, 463 U.S. at 96 n.14.

statute,[230] whereas *Young* involved a constitutional claim.[231] Second, the Court frequently characterizes the *Young* doctrine as applying to cases where plaintiffs seek prospective relief to enjoin ongoing violations of federal law,[232] whereas the *Shaw* court enjoined enforcement of a state statute that was preempted by federal law.[233]

Leading commentators have stated that "[t]he best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws."[234] Several lower federal courts have also endorsed this view.[235] One could infer such an implied right of action from several U.S. Supreme Court cases,[236] but the U.S. Supreme Court has never explicitly endorsed such an implied cause of action. If the Supremacy Clause does create such an implied right of action, and if *Shaw*'s extension of *Young* to statutory preemption claims is also correct, then the Supremacy Clause arguably creates an implied right of action to enjoin enforcement of state laws that are preempted by treaties, because the Supremacy Clause accords equal status to treaties and statutes.[237]

This statement requires one important caveat relating to the preceding distinction between the no-judicial-remedies concept of non-self-execution

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230. The substantive right at issue in *Shaw* derived from the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461. *See Shaw*, 463 U.S. at 90–92.

231. The substantive right at issue in *Young* derived from the Fourteenth Amendment Due Process Clause. *See Young*, 209 U.S. at 129–30.

232. *See Coeur d'Alene*, 521 U.S. at 281 (Kennedy, J., plurality opinion) (stating that *Young* applies to "[a]n allegation of an on-going violation of federal law where the requested relief is prospective"); *id.* at 288 (O'Connor, J., concurring) (noting that *Young* applies "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law"); *id.* at 298–99 (Souter, J., dissenting) (stating that *Young* applies to "an individual's action against state officers" where the plaintiff seeks "prospective relief to address an ongoing violation" of federal law).

233. *Shaw*, 463 U.S. at 108 (holding that New York's Human Rights Law is partially pre-empted by ERISA).

234. 13B Wright & Miller, *supra* note 7, § 3566; *see also* Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. Rev. 835, 861 (1995) ("Essentially, the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are violating the U.S. Constitution."); Jackson, Seminole Tribe, *supra* note 4, at 515 (stating that *Young* doctrine stands "for the proposition that an implied cause of action for injunctive relief to enforce federal law [against state officers] will be available when a court otherwise has jurisdiction over the case.").

235. *See infra* note 354.

236. *See infra* notes 346–93 and accompanying text (discussing U.S. Supreme Court cases that support implied right of action under Supremacy Clause).

237. *See* U.S. Const. art. VI, cl. 2; *supra* note 138.

and the no-private-right-of-action concept.[238] If a treaty is not self-executing in the sense that it does not permit judicial remedies, then the Supremacy Clause cannot supply a judicial remedy, because the core principle of the no-judicial-remedies concept is the separation of powers notion that certain treaties are enforceable only by the political branches and not by the judicial branch. However, if a treaty is not self-executing in the more limited sense that it is judicially enforceable but does not create a private right of action, then the Supremacy Clause might create an implied right of action against state officers to enjoin enforcement of state laws that the treaty preempts.

Part IV contends that the Supremacy Clause creates such an implied right of action. The argument is divided into four sections. The first section briefly summarizes the scope of the *Young* doctrine. The second section defends *Shaw*'s extension of *Young*'s jurisdictional principle to statutory preemption claims. The third section contends that the Supremacy Clause creates an implied private right of action for claims within the jurisdictional scope of *Young* and *Shaw*. The final section advances the thesis that both the jurisdictional principle and the implied private right of action extend to preemption claims based on non-self-executing treaties that are judicially enforceable but that do not create a private right of action.

A. The Young *Doctrine*

The *Young* doctrine has three distinct but interrelated elements. First, the Eleventh Amendment aspect of the *Young* doctrine stands for the proposition that the Eleventh Amendment does not bar suits against state officers in which plaintiffs seek prospective relief to enjoin an officer's threatened or ongoing violation of federal law.[239] Second, the jurisdictional aspect of the *Young* doctrine holds that federal courts can exercise federal question jurisdiction over suits that fall within the *Young* exception to the Eleventh Amendment.[240] Third, the "implied right of action" element of the

238. *See supra* notes 80–87 and accompanying text.

239. *See* Chemerinsky, *supra* note 116, at 412–13. The Court has occasionally stated that *Young* applies to "ongoing" violations of federal law. *See supra* note 232. However, the Court has also acknowledged that *Young* applies to threatened violations. *See* Morales v. Trans World Airlines, 504 U.S. 374, 381 (1992) ("In *Ex parte Young*, we held that . . . federal courts [may] enjoin state officers 'who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act . . . .'") (quoting *Ex parte Young*, 209 U.S. 123, 156 (1908)).

240. *See infra* notes 253–264 and accompanying text.

Young doctrine provides plaintiffs an implied federal cause of action for injunctive relief against state officers who violate federal law.[241]

The *Young* doctrine promotes two central policy objectives. First, the *Young* doctrine has been called "'indispensable to the establishment of constitutional government and the rule of law.'"[242] If the judiciary lacks the power to enjoin an ongoing violation of the law, then executive branch officials can disobey the law with impunity, and the government becomes a government of men, not of laws.[243] Second, the *Young* doctrine is necessary to vindicate the federal interest in the supremacy of federal law over state law, an interest that has its constitutional basis in the Supremacy Clause.[244] These policy objectives are pertinent, regardless of whether the federal law at issue is constitutional, statutory, or treaty law.

1. Young *and the Eleventh Amendment*

The Eleventh Amendment states "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or subjects of any Foreign State."[245] Although the text of the Amendment does not address suits against a State by its own citizens, the principle of sovereign immunity that underlies the Eleventh Amendment also precludes federal courts from adjudicating such suits against non-consenting States.[246] The *Young* doctrine is an exception to the

241. *See infra* Part IV.C.

242. Seminole Tribe v. Florida, 517 U.S. 44, 174 (1996) (Souter, J., dissenting) (quoting Charles Alan Wright, *Law of Federal Courts* 292 (4th ed. 1983)).

243. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

244. *See* Green v. Mansour, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'") (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)).

245. U.S. Const. amend XI.

246. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890). Moreover, despite the fact that the Amendment refers to the "judicial power of the United States," the U.S. Supreme Court recently held that the principle of state sovereign immunity, which "neither derives from nor is limited by the terms of the Eleventh Amendment," precludes Congress, when acting under Article I, from subjecting

principle of state sovereign immunity. As such, *Young* stands for the proposition that neither the Eleventh Amendment, nor the principle of sovereign immunity it expresses, bar suits against state officers in which plaintiffs seek prospective relief to end an officer's threatened or ongoing violation of federal law.[247]

There are four key limitations on the scope of the *Young* exception to state sovereign immunity. First, the relief sought must be prospective, not retrospective.[248] Second, the plaintiff's claim must be based on federal law, not state law.[249] Third, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*."[250] Fourth, the Court held *Young* inapplicable to a suit by the Coeur d'Alene Tribe seeking "declaratory and injunctive relief precluding Idaho officials from regulating or interfering with [the Tribe's] possession of submerged lands beneath Lake Coeur d'Alene."[251] In light of the Court's splintered decision in *Coeur d'Alene*, the impact of this decision on the scope of the *Young* exception remains unclear.[252]

"nonconsenting States to private suits for damages *in state courts*." Alden v. Maine, 527 U.S. 706, 712 (1999) (emphasis added).

247. *See* Chemerinsky, *supra* note 116, at 412–16; Hart & Wechsler, *supra* note 116, at 1073–77.

248. Edelman v. Jordan, 415 U.S. 651, 664–71 (1974). Although the *Edelman* holding is frequently described in terms of a distinction between prospective and retrospective relief, one commentator has recently argued that the original *Edelman* holding excluded only retrospective monetary relief from the scope of the *Young* doctrine. *See* Vázquez, *Night and Day*, *supra* note 4, at 22–25. Under this view, the Eleventh Amendment should be construed to permit retrospective non-monetary relief against state officers who violate federal law. *See id.* at 100–01. Although Professor Vázquez makes a persuasive argument, this Article will refer simply to the distinction between prospective and retrospective relief, because the issues raised by the distinction between retrospective monetary relief and retrospective non-monetary relief are tangential to the central concerns of this Article.

249. *See Pennhurst*, 465 U.S. at 104–06.

250. Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996).

251. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 288 (1997) (O'Connor, J., concurring).

252. Justice Kennedy wrote the lead opinion for himself and Chief Justice Rehnquist, which would have severely restricted the scope of the *Young* exception. *See id.* at 270–80. Justice O'Connor wrote a separate concurring opinion for herself and two other Justices, which casts *Coeur d'Alene* as a very narrow exception to *Young*. *See id.* at 288–97 (O'Connor, J., concurring). The four dissenters contended that *Coeur d'Alene* is within the scope of the *Young* exception. *See id.* at 297–319 (Souter, J., dissenting). For commentary on *Coeur d'Alene*, see Jackson, *Coeur D'Alene*, *supra* note 4 and Vázquez, *Night and Day*, *supra* note 4.

2. Young *and Federal Question Jurisdiction*

To obtain relief in federal court, a plaintiff's complaint must, inter alia, satisfy the requirements of the well-pleaded complaint rule[253] and state a valid (usually federal) cause of action.[254] Although the two requirements are closely linked, it is analytically useful to treat them separately. Accordingly, this section addresses the relationship between *Young* and the well-pleaded complaint rule, which this Article will refer to as the jurisdictional aspect of the *Young* doctrine. Section IV.B. discusses *Shaw*, statutory preemption claims, and the well-pleaded complaint rule. Section IV.C. addresses the "implied cause of action" element of the *Young* doctrine, as it relates to both constitutional and statutory preemption claims.[255]

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253. To satisfy the well-pleaded complaint rule, the federal element of plaintiff's complaint must be an essential part of plaintiff's well-pleaded claim for relief, not merely a federal defense to an anticipated state law claim, or a reply to an anticipated federal defense. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (holding that "defensive" federal claim does not give rise to federal question jurisdiction); *see also* Hart & Wechsler, *supra* note 116, at 909–13.

254. In a famous passage, Justice Holmes said that "[a] suit arises under the law that creates the cause of action," American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916), implying that the plaintiff must state a federal cause of action to bring a claim in federal court. The *Smith* exception to the Holmes formula holds that, in cases where state law creates the cause of action, the case may still arise under federal law for purposes of federal question jurisdiction if "the right to relief depends upon the construction or application of the Constitution or laws of the United States." Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921). *Smith*, however, is a fairly narrow exception to the Holmes formula. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808–10 (1986).

255. This Article's distinction between the jurisdictional and cause-of-action elements of the *Young* doctrine follows the conceptual approach that the U.S. Supreme Court adopted in *Bell v. Hood*, 327 U.S. 678 (1946), where the Court said that lower courts must address the jurisdictional issue before determining whether a plaintiff has a valid cause of action. *See id.* at 682 ("Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."). For a summary of subsequent cases that have adopted the *Bell* approach to distinguishing between the concepts of jurisdiction and cause of action, see Hart & Wechsler, *supra* note 116, at 933–37.

There is an obvious tension between the *Bell* approach and the Holmes approach. The Holmes approach suggests that a plaintiff must show that there is a federal cause of action in order to establish federal question jurisdiction. *Bell* states that a court must first assume subject matter jurisdiction before it can determine whether the plaintiff has a valid cause of action. However, the apparent discrepancy between *Bell* and the Holmes formula is purely formal. If the plaintiff fails to assert a valid federal cause of action, the claim will usually be dismissed—either for lack of jurisdiction (under the Holmes test) or for failure to state a claim upon which relief can be granted (under the *Bell* approach). Cases falling within the *Smith* exception to the Holmes formula could proceed in federal court under either the *Bell* approach or the Holmes approach. Moreover, under either approach, cases raising a state law cause of

In *Ex parte Young*, stockholders of various railroad companies were advised that the Minnesota attorney general had threatened to institute civil or criminal enforcement proceedings against the companies in state court if they failed to comply with state statutes and administrative orders that set a ceiling on the rates the railroad companies could charge.[256] Before the attorney general instituted enforcement proceedings in state court, the stockholders sued the attorney general (and others) in federal court to enjoin enforcement of the state statutes and orders. Their complaint alleged, and the Court agreed, that the state laws were invalid insofar as they conflicted with the Due Process Clause of the Fourteenth Amendment.[257] Thus, *Young* can be viewed as a preemption case. The logic of the *Young* decision was that the Minnesota attorney general could not enforce the state statutes because they conflicted with the Fourteenth Amendment, and under the Supremacy Clause, the U.S. Constitution preempts conflicting state laws, thereby rendering them unenforceable.

Before *Young*, the courts construed similar cases as raising state tort claims, to which state officials would raise a statutory defense, also based on state law. The federal constitutional issue, under this view, arose only as a reply to the statutory defense.[258] But if the claim is conceived in this way, it cannot give rise to federal question jurisdiction, because it runs afoul of the well-pleaded complaint rule.[259] *Young*, however, squarely held that the plaintiffs' claim arose under federal law for purposes of federal question jurisdiction.[260] Thus, as commentators have noted, the *Young* court clearly understood the federal constitutional question to be offensive, not defensive,

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action that do not fall within the *Smith* exception could be litigated in state court. In short, there is no substantial difference between the *Bell* approach and the Holmes approach. Therefore, this Article's use of the *Bell* approach to distinguish between the jurisdictional and cause-of-action elements of the *Young* doctrine promotes analytic clarity but does not affect the substance of the analysis.

256. *Ex parte Young*, 209 U.S. 123, 129–31 (1908).

257. *See id.* at 130, 148–49.

258. *See* Michael G. Collins, *Economic Rights, Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1510–13 (1989); Henry M. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 523–24 (1954); Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1128–29 (1969).

259. *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908), was decided about eight months after *Young*. However, the well-pleaded complaint rule that is typically associated with the *Mottley* decision was "fully in force" before *Young* was decided. *See* Collins, *supra* note 258, at 1512–13.

260. *Young*, 209 U.S. at 143–45.

for purposes of the well-pleaded complaint rule.[261] Therefore, *Young*'s jurisdictional holding means that a claim is offensive, for purposes of the well-pleaded complaint rule, if an individual sues a state officer for prospective relief to enjoin the threatened enforcement of a state law on the grounds that the state law conflicts with the U.S. Constitution.

Ten years after *Young*, the Court applied *Young*'s jurisdictional holding to a case in which the constitutionality of the state law was uncontested, but the plaintiffs alleged that state officers were administering the law in an unconstitutional manner.[262] Since then, the *Young* doctrine has been applied to two types of constitutional claims: (1) constitutional preemption claims, like *Young*, in which the plaintiff alleges that a state law is invalid because it conflicts with the U.S. Constitution; and (2) claims where the plaintiff concedes the constitutionality of the state law, but alleges that a state officer's actions are unconstitutional.[263] Inasmuch as the enforcement of a state law that conflicts with the U.S. Constitution is, itself, a constitutional violation, both categories are included within the general formulation that the *Young* doctrine applies to claims for prospective relief to enjoin constitutional violations by state officers. Thus, modern *Young* cases tend to describe the scope of the *Young* doctrine in terms of the more general formulation.[264]

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261. *See* Collins, *supra* note 258, at 1512–14; Hart, *supra* note 258, at 523–24; Hill, *supra* note 258, at 1124–27.

262. *See* Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 506–08 (1917) (stating that *Young*'s jurisdictional "principle is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional" and holding that plaintiffs' allegations "conferred jurisdiction upon the Federal court").

263. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 118 (1984) (noting that *Greene* "held that *Ex parte Young* applied to all allegations challenging the constitutionality of official action, regardless of whether the state statute under which the officials purported to act was constitutional or unconstitutional").

264. *See* Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996) ("[S]ince our decision in *Ex parte Young*, we often have found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law.") (internal citations and quotations omitted); Green v. Mansour, 474 U.S. 64, 68 (1985) (stating that *Young* allows federal courts to grant "prospective injunctive relief to prevent a continuing violation of federal law"); *Pennhurst*, 465 U.S. at 102–03 ("[W]hen a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief."); *see also supra* note 232.

B. Shaw, *Statutory Preemption Claims, and the Well-Pleaded Complaint Rule*

Recall that *Shaw* extended *Young*'s jurisdictional holding to statutory preemption claims.[265] One could distinguish *Shaw* from *Young* by saying that the *Young* doctrine authorizes courts to enjoin violations of federal law, whereas *Shaw* authorizes courts to enjoin enforcement of state statutes that are preempted by federal law. However, it should be apparent from the preceding discussion of the *Young* doctrine that this is a distinction without a difference. The *Young* court itself enjoined enforcement of state statutes that were preempted by federal law, precisely because enforcement of the statutes would have been a violation of federal law. Therefore, the crucial distinction between *Young* and *Shaw* is that the federal law at issue in *Young* was constitutional, whereas the federal law at issue in *Shaw* was statutory. This section contends that both the Eleventh Amendment and the jurisdictional elements of the *Young* doctrine apply equally to constitutional and statutory preemption claims.

1. The Eleventh Amendment and Statutory Preemption Claims

As noted above, the *Young* exception to the Eleventh Amendment prohibition against suing non-consenting states is typically justified in terms of the need to vindicate the supremacy of federal law and to promote the rule of law.[266] If individuals cannot obtain a judicial remedy for constitutional violations by state officers, the rule of law is undermined, and the supremacy of federal law is threatened. Similarly, when state officers attempt to enforce state laws that are preempted by federal statutes, their actions also implicate the rule-of-law and federal supremacy concerns underlying the *Young* doctrine. Therefore, it should not be surprising that the U.S. Supreme Court has consistently upheld federal jurisdiction over federal statutory claims for injunctive relief against state officers, without interposing an Eleventh Amendment bar.[267]

Prior to *Shaw*, the U.S. Supreme Court decided several preemption cases involving federal statutory rights where no substantive constitutional rights

265. *See supra* notes 228–29 and accompanying text.

266. *See supra* notes 242–44 and accompanying text.

267. *See infra* notes 268–87 and accompanying text.

were at issue,[268] and where the Court affirmed an award of prospective injunctive relief against state government officers. In one pre-*Shaw* statutory preemption case, the U.S. Supreme Court affirmed an injunction against the Governor of Washington to prevent enforcement of a state statute that was preempted by a federal statute. The Court explicitly relied on *Young* to reject an Eleventh Amendment challenge to the suit.[269] In two other pre-*Shaw* statutory preemption cases, the Court upheld injunctions against state officers without explicitly relying on *Young*.[270] Although neither case mentions the Eleventh Amendment, they implicitly rely on the *Young* doctrine to overcome what would otherwise be a valid Eleventh Amendment defense.[271]

Since *Shaw*, the U.S. Supreme Court has decided at least seventeen cases in which private plaintiffs sued state officers[272] in federal court to obtain

268. The Court occasionally describes statutory preemption claims as constitutional because the Supremacy Clause establishes the preemptive effect of federal law in cases where plaintiffs assert substantive rights based upon federal statutes. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 722–26 (1991). However, that terminology is unnecessarily confusing because cases in which plaintiffs assert substantive constitutional rights also rely upon the Supremacy Clause to establish the preemptive effect of federal law. *See id.* at 723 ("[T]he ultimate power to strike down a state law repugnant to the federal Constitution always implicitly derives from the supremacy clause."). Accordingly, this Article refers to claims where the substantive right derives from a federal statute as "statutory preemption claims" rather than "constitutional claims."

269. Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n.6 (1978). The plaintiffs in *Ray* also raised a federal constitutional claim, alleging that the state statute was invalid under the Commerce Clause. *Id.* at 156. However, the Court rejected the constitutional claim, *see id.* at 179–80, and awarded injunctive relief on the basis of the federal statutory claim, *see id.* at 174–78. Therefore, the statutory claim must have been the basis for invoking the *Young* exception to sovereign immunity.

270. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) (affirming order enjoining Illinois Attorney General from instituting enforcement proceedings against respondents, on grounds that the state law to be enforced was preempted by federal statute); Hines v. Davidowitz, 312 U.S. 52, 73–74 (1941) (affirming order enjoining Pennsylvania Secretary of Labor from enforcing Pennsylvania statute on grounds that it was preempted by federal statute).

271. There is no suggestion in either *Rice* or *Hines* that Congress abrogated the states' Eleventh Amendment immunity when it enacted the federal statutes at issue in those cases. One could argue that, in each case, defendants waived their Eleventh Amendment defense by not raising it. However, the fact that the defendants apparently did not raise such a defense indicates that it was broadly assumed that the *Young* doctrine would defeat any such defense.

272. Excluded from this set are (a) cases in which plaintiffs sued local government officers, and (b) cases in which the United States intervened as a plaintiff. *See* United States v. Locke, 529 U.S. 89 (2000) (United States intervened as plaintiff in statutory preemption claim for injunctive relief against Governor of Washington); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (regarding statutory preemption claim for injunctive relief against local government officers). The Eleventh Amendment does not bar suits against local governments, *see* Chemerinsky, *supra* note 116, at 406, nor does it bar suits by the United States against state governments, *see id.* at 404.

prospective relief[273] from enforcement of state laws that were allegedly preempted by federal statutes or regulations.[274] Only one of these seventeen

273. The term "prospective relief," as used herein, includes claims for declaratory relief, as well as those for injunctive relief. For a discussion of *Young*'s application to claims for declaratory relief, see *infra* note 300.

274. *See* Crosby v. National Foreign Trade Council, 120 S.Ct. 2288, 2291–93 (2000) (nonprofit corporation sued Massachusetts state officer to enjoin enforcement of state statute regulating trade with Burma that was allegedly preempted by federal statute regulating trade with Burma); Foster v. Love, 522 U.S. 67 (1997) (Louisiana voters sued Governor of Louisiana to enjoin enforcement of state "open primary" statute that was allegedly preempted by federal election statute); DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997) (trustees of trust fund sued New York Commissioner of Health to enjoin enforcement of state tax law that was allegedly preempted by ERISA); California Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316 (1997) (contractor on public works project sued California state agencies and officers for declaratory judgment that state labor law was preempted by ERISA); Barnett Bank v. Nelson, 517 U.S. 25 (1996) (bank sued Florida Insurance Commissioner to enjoin enforcement of state banking law allegedly preempted by federal banking law); Dalton v. Little Rock Family Planning Servs., 516 U.S. 474 (1996) (Medicaid providers and physicians sued Arkansas state officials to enjoin enforcement of state constitutional amendment that was allegedly preempted by Title XIX of Social Security Act); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (commercial insurers and trade associations sued New York state officials to enjoin enforcement of New York statute that was allegedly preempted by ERISA); Anderson v. Edwards, 514 U.S. 143 (1995) (recipients of federal funds sued Director of California Department of Social Services to enjoin enforcement of state regulation that was allegedly preempted by federal statute governing benefits under Aid to Families with Dependent Children program); Livadas v. Bradshaw, 512 U.S. 107 (1994) (employee who was fired sued California Labor Commissioner to invalidate provision of California Labor Code that was preempted by National Labor Relations Act); Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) (trade association sued Director of Illinois Environmental Protection Agency to enjoin enforcement of state law that was allegedly preempted by Occupational Safety and Health Act); Morales v. Trans World Airlines, 504 U.S. 374 (1992) (airlines sued state attorneys general to enjoin enforcement of state regulations that were allegedly preempted by Airline Deregulation Act); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (natural gas companies sued Michigan state officials for declaratory judgment that state statute was preempted by the Natural Gas Act); Honig v. Doe, 484 U.S. 305 (1988) (handicapped students sued California Superintendent of Public Instruction to enjoin enforcement of school district expulsion orders that were allegedly preempted by Education of Handicapped Act); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (mining company sued officials of California Coastal Commission to enjoin enforcement of state permit requirement that was allegedly preempted by various federal mining and environmental statutes and regulations); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (savings and loan association and other plaintiffs sued Director of California Department of Fair Employment and Housing to enjoin enforcement of state employment discrimination statute that was allegedly preempted by Title VII of Civil Rights Act of 1964); Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 468 U.S. 491 (1984) (union and its president sued New Jersey state officials to enjoin enforcement of certain provisions of state's Casino Control Act that were allegedly preempted by NLRA); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (cable television operators sued Director of Oklahoma Alcoholic Beverage Control Board to enjoin enforcement of state ban on broadcast advertising of alcoholic beverages that was allegedly preempted by Federal Communications Commission regulations).

cases even mentions the Eleventh Amendment;[275] one other case mentions *Young*.[276] However, all seventeen implicitly rely on *Young* to overcome what would otherwise be a valid Eleventh Amendment bar to the exercise of federal jurisdiction.[277]

Preemption cases aside, the U.S. Supreme Court's major *Young* decisions also support the application of the Eleventh Amendment aspect of the *Young* doctrine to federal statutory claims. In the past three decades, the U.S. Supreme Court has decided four key cases limiting the scope of the *Young* doctrine: *Edelman v. Jordan*,[278] *Pennhurst State School & Hospital v. Halderman*,[279] *Seminole Tribe v. Florida*,[280] and *Idaho v. Coeur d'Alene Tribe*.[281] None of these four cases, as presented to the U.S. Supreme Court, involved federal constitutional claims.[282]

In *Edelman*, the Court left undisturbed the lower court's injunction against Illinois state officials mandating future compliance with federal regulations but held that the Eleventh Amendment barred an award of retroactive benefits.[283] In *Pennhurst*, the Court held *Young* inapplicable to state law claims against state officials but remanded the case for lower courts to consider whether a grant of relief could be upheld on the basis of a federal statutory claim that the Court of Appeals had not addressed.[284] In

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275. *Livadas*, 512 U.S. at 115 n.9 (noting that "the portion of the District Court's order awarding monetary relief against the Commissioner in her official capacity was likely barred by the Eleventh Amendment").

276. *Morales*, 504 U.S. at 381 (concluding that "*Young* establishes that injunctive relief was available here").

277. There is no suggestion in any of the 17 cases that Congress abrogated the states' Eleventh Amendment immunity when it enacted the federal statutes at issue in those cases.

278. 415 U.S. 651 (1974).

279. 465 U.S. 89 (1984).

280. 517 U.S. 44 (1996).

281. 521 U.S. 261 (1997).

282. *But see infra* notes 283–84.

283. *Edelman*, 415 U.S. at 664–71. The plaintiffs in *Edelman* alleged that the defendants had violated both the Fourteenth Amendment and federal regulations. *Id.* at 653. However, the district court judgment was based entirely on Illinois' failure to comply with federal regulations, *see id.* at 656, and the Fourteenth Amendment claims were not contested on appeal, *see id.* at 657–58. Thus, the U.S. Supreme Court's Eleventh Amendment holding was based squarely on the regulatory violation, not on the Fourteenth Amendment.

284. *Pennhurst*, 465 U.S. at 124–25. In the initial case, the District Court found violations of the Eighth Amendment and the Due Process and Equal Protection Clauses, as well as two federal statutes. *See id.* at 92–93. It awarded injunctive relief. *See id.* at 93. The Third Circuit affirmed on the basis of the federal Developmentally Disabled Assistance and Bill of Rights Act, without reaching any of the constitutional issues. *See id.* at 93–94. The U.S. Supreme Court reversed the Third Circuit's statutory holding and remanded for the court of appeals to determine whether the district court injunction could be

Seminole Tribe, a case in which plaintiffs' claims were based entirely on a single federal statute, the Court assumed that *Young* applied to federal statutory claims generally, but held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before . . . permitting an action against a state officer based upon *Ex parte Young*."[285] Finally, in *Coeur d'Alene*, a case in which the Couer D'Alene Indian Tribe claimed property rights on the basis of an 1873 federal executive order, it was common ground among all nine Justices that, absent countervailing considerations,[286] the executive order, being supreme federal law, would provide a sufficient basis to invoke the *Young* doctrine.[287] If the Court intended to limit the Eleventh Amendment aspect of the *Young* doctrine to constitutional claims, it could have decided these four cases on that basis. Instead, the Court decided all four on narrower grounds, thereby implicitly affirming the principle that *Young* applies to claims for prospective relief against state officers who violate federal statutes, regulations, or executive orders.

In sum, both principle and precedent support the proposition that the *Young* exception to the Eleventh Amendment applies not only to violations of federal constitutional law, but also to statutory preemption claims and other violations of federal statutes.

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upheld on the basis of state law, the U.S. Constitution, or section 504 of the federal Rehabilitation Act. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). On remand, the Third Circuit once again upheld the injunction, on the basis of state law, without reaching any of the federal issues. *Pennhurst*, 465 U.S. at 95–96. The U.S. Supreme Court again reversed, holding that *Young* did not authorize an injunction against state officials for violations of state law, *see id.* at 104–06, but once again remanded for the court of appeals to determine whether the district court injunction could be upheld on the basis of federal constitutional or statutory claims, *see id.* at 125.

285. 517 U.S. at 74.

286. As noted above, in light of the Court's splintered decision in *Coeur d'Alene*, it is difficult to delineate the precise nature of the countervailing considerations that the Court relied on to support the result it reached. *See supra* note 252 and accompanying text.

287. *Coeur d'Alene v. Idaho*, 521 U.S. 261, 281 (1997) ("An allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction."); *id.* at 288 (O'Connor, J., concurring) ("Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court."); *id.* at 298–99 (Souter, J., dissenting) (stating that *Young* applies to suits against state officers that seek prospective relief to address ongoing violations of federal law).

2. *Statutory Preemption Claims and the Well-Pleaded Complaint Rule*

In *Shaw v. Delta Air Lines, Inc.*,[288] plaintiffs sued to enjoin the threatened enforcement of a New York statute on the grounds that it was preempted by the Employee Retirement Income Security Act (ERISA).[289] Although the plaintiffs did not raise any constitutional claims, the U.S. Supreme Court explicitly relied on *Young* as a basis for the district court's exercise of federal question jurisdiction. The Court said:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights [citing *Ex parte Young*]. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.[290]

Leaving aside the implications of this statement for the cause of action element of the *Young* doctrine,[291] the statement means, at a minimum, that claims against state officers to enjoin enforcement of state laws that are allegedly preempted by federal statutes are offensive for purposes of the well-pleaded complaint rule. The plaintiffs' federal claim in *Shaw* was offensive for precisely the same reason that the plaintiffs' claim in *Young* was offensive: In both cases, plaintiffs threatened with a state enforcement action sued state officials to enjoin enforcement of a state law that allegedly conflicted with federal law.[292] It would be absurd to claim that *Young* was offensive, and *Shaw* was defensive, simply because *Young* raised a constitutional claim and *Shaw* raised a statutory claim.

There is only one case in which the U.S. Supreme Court has explicitly relied on *Shaw* as a basis for federal question jurisdiction. *Lawrence County v. Lead-Deadwood School District*[293] involved the Payment in Lieu of Taxes

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288. 463 U.S. 85 (1983).

289. *Id.* at 92–93 & n.9.

290. *Id.* at 96 n.14.

291. See *infra* Part IV.C.3. for a discussion of *Shaw* and implied rights of action.

292. The conclusion that the federal claim is "offensive" in both *Young* and *Shaw* is bolstered by the principle that "'the party who brings a suit is master to decide what law he will rely upon.'" Bell v. Hood, 327 U.S. 678, 681 (1946) (quoting The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)). In both *Young* and *Shaw*, the plaintiffs manifestly chose to rely upon federal law as a basis for relief.

293. 469 U.S. 256 (1985).

Act, a federal statute that compensates local governments for the loss of tax revenues resulting from the tax-immune status of federal lands located in their jurisdictions.[294] South Dakota enacted a statute that, if enforced, would have required counties to give sixty percent of their federal funding to school districts. Lawrence County refused to comply with the state statute, claiming that the federal Act gave it discretion to spend the funds "for any governmental purpose."[295] The county filed suit in federal court, seeking a declaratory judgment that the state statute conflicted with the federal Act and was therefore invalid under the Supremacy Clause.[296] The district court entered a declaratory judgment in favor of the county, but the Eighth Circuit vacated the judgment, holding that the county's claim was "defensive" for purposes of the well-pleaded complaint rule, and therefore did not give rise to federal subject matter jurisdiction.[297] The U.S. Supreme Court stated that the Eighth Circuit "ruling was erroneous"[298] because the claim was offensive, not defensive.[299]

Since *Shaw*, the federal courts of appeals have consistently treated *Shaw*-like statutory preemption claims[300] as offensive claims for purposes of the

294. *Id.* at 258.

295. *Id.* at 258–59.

296. *See id.* at 259 n.6.

297. Lawrence County v. South Dakota, 668 F.2d 27, 31 (8th Cir. 1982), *rev'd*, 469 U.S. 256 (1985) ("In effect, the county's complaint asserts a defense against a potential claim to the funds by the school districts and special districts . . . . This defensive assertion of the preemption doctrine, however, cannot convert the action into one arising under federal law within the meaning of 28 U.S.C. § 1331.") After the Eighth Circuit vacated the judgment, the county filed suit in state court. *See Lawrence County*, 469 U.S. at 259–60. The case eventually came to the U.S. Supreme Court after the South Dakota Supreme Court held that the federal statute did not preempt the state statute. *See id.*

298. *Lawrence County*, 469 U.S. at 259 n.6.

299. *See id.* ("[A] plaintiff who seeks injunctive relief from state regulation on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.") (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983)). *Lawrence County* is arguably an extension of *Shaw*, because the plaintiff sought only a declaratory judgment, not injunctive relief.

300. *Shaw*-like statutory preemption claims include claims that satisfy the following criteria: (1) plaintiffs file suit in federal court, (2) against state or local officers or government agencies, (3) for prospective declaratory or injunctive relief, (4) to block enforcement of state or local laws, and (5) that are allegedly preempted by federal statutes or regulations.

One could argue that claims against state government agencies should be excluded, because claims against state agencies are generally treated as claims against the state, which are barred by the Eleventh Amendment. *See* Hart & Wechsler, *supra* note 116, at 1073 ("A suit nominally against an unconsenting state itself (rather than an officer) is barred regardless of the kind of relief sought."). However, there are

well-pleaded complaint rule. In cases where plaintiffs sued state or local government officers or agencies to obtain prospective relief from enforcement of state or local laws that were allegedly preempted by federal statutes or regulations, the First,[301] Second,[302] Third,[303] Fifth,[304] Sixth,[305]

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several cases in which courts of appeals have relied on *Shaw* to establish federal question jurisdiction over claims for prospective relief against state government agencies. *See* Freehold Cogeneration Assocs. v. Board of Regulatory Comms., 44 F.3d 1178, 1184–85 (3rd Cir. 1995); Bunning v. Kentucky, 42 F.3d 1008, 1011 (6th Cir. 1994); Bristol Energy Corp. v. State of New Hampshire Pub. Utils. Comm'n, 13 F.3d 471, 474 (1st Cir. 1994); Southern Pac. Transp. Co. v. Public Utils. Comm'n, 716 F.2d 1285, 1288 (9th Cir. 1983). One possible explanation of these cases is that the plaintiffs also named state officers as defendants, but the published opinions fail to mention that fact. At any rate, this Article includes discussion of these cases because the courts of appeals relied on *Shaw* to establish federal question jurisdiction.

One could also argue that declaratory judgment actions, in which plaintiffs do not seek injunctive relief, should be excluded. In *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952), the Court stated in dicta that a declaratory judgment action against state government officers to forestall a state enforcement action did not give rise to federal question jurisdiction:

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim.

See id. at 248. Thus, commentators have noted that the extension of *Shaw* to declaratory judgment actions is inconsistent with the *Wycoff* dicta. *See* Hart & Wechsler, *supra* note 116, at 947–48; Monaghan, *supra* note 6, at 237–41.

Other commentators have argued that there is no principled basis for barring jurisdiction over suits for declaratory relief against state officers, while allowing federal jurisdiction over suits for injunctive relief. *See* 13B Wright & Miller, *supra* note 7, § 3566 ("But to hold that a federal court would have jurisdiction of a suit to enjoin enforcement of a state statute, but not of a suit for a declaration that the statute cannot be enforced, would be to turn somersaults with both history and logic."). Moreover, there are at least three U.S. Supreme Court decisions that could be construed to support the extension of *Shaw*'s jurisdictional principle to claims for declaratory relief. *See* Foster v. Love, 522 U.S. 67 (1997); California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc. 519 U.S. 316 (1997); *Lawrence County*, 469 U.S. 256. It is beyond the scope of this Article to explore in detail the jurisdictional significance of the distinction between claims for declaratory relief and claims for injunctive relief in suits against state officers. The remainder of this Article assumes that the distinction lacks jurisdictional significance, although this author admits that a plausible argument could be made for limiting the *Shaw* principle to claims for injunctive relief only.

301. *See Bristol Energy*, 13 F.3d at 474 (non-utility power producers sued state regulatory agency to enjoin enforcement of agency order that was allegedly preempted by Federal Energy Regulatory Commission regulations promulgated under the Public Utility Regulatory Policies Act); Playboy Enters., Inc. v. Public Serv. Comm'n, 906 F.2d 25, 29–31 (1st Cir. 1990) (Playboy Enterprises and cable television trade association sued Puerto Rican prosecutor to enjoin enforcement of Puerto Rican obscenity law that was allegedly preempted by Cable Communications Policy Act). *But see* Nashoba Communications v. Town of Danvers, 893 F.2d 435, 440–41 (1st Cir. 1990) (distinguishing *Shaw* on grounds that plaintiff here was suing to enjoin town from enforcing contract provision, not local ordinance or regulation).

Seventh,[306] Eighth,[307] Ninth,[308] Tenth,[309] and Eleventh[310] Circuit Courts of Appeals have relied on *Shaw* to establish federal question jurisdiction. The

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302. *See* Burgio & Campofelice v. NYS Dep't of Labor, 107 F.3d 1000, 1005–07 (2d Cir. 1997) (involving public works contractor who sued New York officials to enjoin enforcement of state labor statute allegedly preempted by ERISA); Cable Television Ass'n v. Finneran, 954 F.2d 91, 94–95 (2d Cir. 1992) (cable television association sued New York state officials to enjoin enforcement of New York cable television regulations allegedly preempted by Cable Communications Policy Act). *But see* Fleet Bank v. Burke, 160 F.3d 883, 889 (2d Cir. 1998) (distinguishing *Shaw* on grounds that plaintiff here primarily sought favorable interpretation of state law, and sought to enjoin enforcement of state law only if it lost on interpretive issue); Concerned Citizens, Inc. v. New York State Dep't of Envtl. Conservation, 127 F.3d 201, 207 (2d Cir. 1997) ("Where state officials have no intention of enforcing state law against a plaintiff, a suit against a private entity cannot be considered a suit 'for relief from state regulation' within the meaning of *Shaw*.").

303. *See Freehold*, 44 F.3d at 1184–85 (non-utility power producer sued New Jersey state agency to enjoin enforcement of state regulatory order that was allegedly preempted by Public Utility Regulatory Policies Act).

304. *See Love*, 90 F.3d 1032 n.8, *aff'd*, 522 U.S. 67 (1997); Cigna Healthplan of Louisiana, Inc. v. Louisiana, 82 F.3d 642, 644 n.1 (5th Cir. 1996) (health maintenance organization and health insurer sued Louisiana attorney general to enjoin enforcement of state health care statute that was allegedly preempted by ERISA); New Orleans Pub. Serv., Inc. v. City of New Orleans, 782 F.2d 1236, 1240–41 (5th Cir. 1986), *rev'd*, 491 U.S. 350 (1989).

305. *See* Associated Builders & Contractors v. Perry, 115 F.3d 386, 388–89 (6th Cir. 1997) (non-union trade association of construction contractors sued Director of the Michigan Department of Labor to enjoin enforcement of state labor law that was allegedly preempted by ERISA); Bunning v. Kentucky, 42 F.3d 1008, 1011 (6th Cir. 1994) (U.S. Congressman sued Kentucky Registry of Election Finance to enjoin enforcement of state campaign finance statute that was allegedly preempted by Federal Election Campaign Act).

306. *See* Commonwealth Edison Co. v. Vega, 174 F.3d 870, 871–72 (7th Cir. 1999) (Commonwealth Edison and its pension plan sued Illinois state official to enjoin enforcement of state unclaimed property act that was allegedly preempted by ERISA); Forest County Potawatomi Community v. Norquist, 45 F.3d 1079, 1082 (7th Cir. 1995) (Indian tribe sued Mayor of Milwaukee to enjoin enforcement of state and local gambling laws that were allegedly preempted by Indian Gaming Regulatory Act).

307. *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Nixon, 210 F.3d 814, 816–17 (8th Cir. 2000) (Merrill Lynch sued Missouri attorney general to enjoin state administrative action that was allegedly preempted by Federal Arbitration Act).

308. *See* Hydrostorage, Inc. v. Northern Cal. Boilermakers, 891 F.2d 719, 724–25 (9th Cir. 1989) (public works contractor who sued California officials to enjoin enforcement of state administrative order that was allegedly preempted by ERISA and NLRA); Southern Pac. Transp. Co. v. Public Utils. Comm'n, 716 F.2d 1285, 1288 (9th Cir. 1983) (railroad sued California Public Utilities Commission to enjoin enforcement of agency order that was allegedly preempted by federal railroad statute).

309. *See* ANR Pipeline Co. v. Corporation Comm'n, 860 F.2d 1571, 1575–77 (10th Cir. 1988) (natural-gas pipeline companies sued Oklahoma officials to enjoin enforcement of state laws regulating interstate pipeline companies that were allegedly preempted by the Natural Gas Act and Natural Gas Policy Act).

310. *See* Barnett Bank v. Gallagher, 43 F.3d 631, 633 (11th Cir. 1995), *rev'd sub nom.*, Barnett Bank v. Nelson, 517 U.S. 25 (1996); Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640, 643 (11th

Courts of Appeals' explicit decisions concerning federal question jurisdiction may or may not imply that plaintiffs had a valid federal cause of action, but those decisions must mean, at a minimum, that plaintiffs' claims satisfied the well-pleaded complaint rule.

There are four statutory preemption cases in which lower courts have relied explicitly on *Shaw* as a basis for federal question jurisdiction and the U.S. Supreme Court has reached the merits without questioning the lower courts' jurisdiction to adjudicate the case.[311] In *New Orleans Public Service, Inc. v. Council of City of New Orleans*,[312] a public utility (NOPSI) sued the City of New Orleans to enjoin enforcement of a local regulatory order that was allegedly preempted by a final order of the Federal Energy Regulatory Commission (FERC) issued pursuant to the Federal Power Act.[313] The district court dismissed NOPSI's claims for lack of subject matter jurisdiction, but the Fifth Circuit reversed, relying explicitly on *Shaw* as a basis for federal question jurisdiction.[314] On remand, the district court abstained, and the Fifth Circuit affirmed the abstention decision.[315] The U.S. Supreme Court then reversed the lower courts' abstention decision, noting that the district court's jurisdiction to decide NOPSI's preemption claim was uncontested, and emphasizing that federal courts have a "virtually unflagging" "obligation to adjudicate claims within their jurisdiction . . . ."[316]

In *Barnett Bank v. Gallagher*,[317] the Eleventh Circuit relied explicitly on *Shaw* as a basis for federal question jurisdiction but ruled that federal banking law did not preempt Florida's banking law.[318] The U.S. Supreme

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Cir. 1990) (environmental protection group sued Director of Alabama Department of Environmental Managment to enjoin issuance of permit that was allegedly prohibited by federal regulations).

311. *See* Foster v. Love, 522 U.S. 67 (1997); California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997); Barnett Bank v. Nelson, 517 U.S. 25 (1996); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989).

312. 491 U.S. 350 (1989).

313. *See id.* at 353–55.

314. New Orleans Pub. Serv., Inc. v. City of New Orleans, 782 F.2d 1236, 1240–41 (5th Cir. 1986), *rev'd sub nom.*, New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989). It is noteworthy that the Fifth Circuit expressly refused to decide whether federal question jurisdiction could be based upon the Federal Power Act. *See id.* at 1240.

315. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 850 F.2d 1069, 1077–80 (5th Cir. 1988), *rev'd*, 491 U.S. 350 (1989).

316. 491 U.S. at 358–59 (quoting Deakins v. Monaghan, 484 U.S. 193, 203 (1988)).

317. 43 F.3d 631 (11th Cir. 1995).

318. *See id.* at 633, 637.

Court reversed, holding that the state law was preempted, without explicitly addressing the jurisdictional issue.[319]

In *Dillingham Construction, Inc. v. County of Sonoma*,[320] where plaintiffs sought only declaratory relief, not an injunction, the federal district court relied explicitly on *Shaw* and *Young* as a basis for federal question jurisdiction but held that the contested provision of the California Labor Code was not preempted by either ERISA or the National Labor Relations Act (NLRA).[321] The Ninth Circuit affirmed the district court's jurisdictional ruling without analysis[322] but reversed on preemption grounds, holding that ERISA preempted the contested state law.[323] Importantly, the Ninth Circuit rejected the plaintiff's § 1983 claim, thus eliminating § 1983 as a possible alternative jurisdictional ground.[324] The U.S. Supreme Court reversed on preemption grounds, without disturbing the lower courts' jurisdictional rulings.[325]

Finally, in *Love v. Foster*,[326] the Fifth Circuit expressly relied on *Shaw* as a basis for federal question jurisdiction[327] and granted a declaratory judgment (not an injunction) that the Louisiana open primary statute was preempted by federal election statutes.[328] The Court expressly declined to consider plaintiffs' constitutional claim, or their § 1983 claim.[329] The U.S. Supreme Court affirmed in a unanimous opinion, without discussing the jurisdictional basis of plaintiffs' claims.[330]

Given that the lower courts expressly relied on *Shaw* as a basis for federal question jurisdiction in these four cases (*Foster*, *Dillingham*, *Barnett Bank*, and *New Orleans Public Service*), the fact that the U.S. Supreme

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319. *See* Barnett Bank v. Nelson, 517 U.S. 25 (1996).

320. 778 F. Supp. 1522 (N.D. Cal. 1991), *rev'd*, 57 F.3d 712, 716 (9th Cir. 1995), *rev'd sub nom.*, California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997).

321. *Id.* at 1534.

322. Dillingham Constr., Inc. v. County of Sonoma, 57 F.3d 712, 716 (9th Cir. 1995), *rev'd sub nom.*, California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997).

323. *See id.* at 717–21.

324. *See id.* at 722.

325. California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997).

326. 90 F.3d 1026 (5th Cir. 1996), *rev'd sub nom.*, Foster v. Love ,522 U.S. 67 (1997).

327. *Id.* at 1032 n.8.

328. *Id.* at 1031.

329. *See id.* at 1032 n.8.

330. Foster v. Love, 522 U.S. 67 (1997).

Court decided all four cases without challenging the lower courts' jurisdiction supports *Shaw*'s jurisdictional principle. *New Orleans Public Service*, in particular, is significant in this regard, because the U.S. Supreme Court overturned the lower courts' abstention decisions and insisted upon the district court's obligation to adjudicate the case.

Since *Shaw*, there have been at least eleven other *Shaw*-like statutory preemption cases,[331] in addition to the cases discussed above, where the Court has implicitly relied upon *Shaw* as a basis for federal question jurisdiction.[332] A review of the U.S. Supreme Court decisions and published lower court decisions[333] in these eleven cases shows that none of the cases expressly relies on 42 U.S.C. § 1983 or its jurisdictional counterpart[334] as a basis for federal question jurisdiction. Nor do any of the published decisions indicate that the allegedly preemptive federal statute provides a basis for federal question jurisdiction. Because jurisdiction does not appear to be based either on the allegedly preemptive statute or on § 1983, the only other

331. See *supra* note 300 for a definition of the term "*Shaw*-like statutory preemption cases."

332. *See* United States v. Locke, 529 U.S. 89 (2000) (association of oil tanker owners sued Governor of Washington to enjoin enforcement of oil tanker design, reporting, and operating regulations promulgated by the state's Office of Marine Safety that were allegedly preempted by various federal statutes and treaties), 148 F.3d 1053 (9th Cir. 1998), *aff'g in part, rev'g in part* 947 F. Supp. 1484 (W.D. Wash. 1996); DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997), *rev'g* NYSA-ILA Med. & Clinical Serv. Fund v. Axelrod, 27 F.3d 823 (2d Cir. 1994); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), *rev'g* Travelers Ins. Co. v. Cuomo, 14 F.3d 708 (2d Cir. 1993), *aff'g in part, rev'g in part* Travelers Ins. Co. v. Cuomo, 813 F. Supp. 996 (S.D.N.Y. 1993); Anderson v. Edwards, 514 U.S. 143 (1995), *rev'g* Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993); Building & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) (suit by organization representing non-union construction industry employers against Massachusetts Water Resources Authority to enjoin enforcement of state regulatory order that was allegedly preempted by ERISA and NLRA) *rev'g* Associated Builders & Contractors of Mass./R.I. v. Massachusetts Water Resource Auth., 935 F.2d 345 (1st Cir. 1991); Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992), *aff'g* National Solid Wastes Mgmt. Ass'n v. Killian, 918 F.2d 671 (7th Cir. 1990); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), *aff'g* 801 F.2d 228 (6th Cir. 1986), *rev'g* 627 F. Supp. 923 (W.D. Mich. 1985); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987), *rev'g* Granite Rock Co. v. California Coastal Comm'n, 768 F.2d 1077 (9th Cir. 1985), *rev'g* Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D.Cal. 1984); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987), *aff'g* 758 F.2d 390 (9th Cir. 1985); Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707 (1985) (operator of blood plasma centers sued county to enjoin enforcement of local plasma collection ordinance that was allegedly preempted by federal regulations promulgated by Food and Drug Administration), *rev'g* Automated Med. Labs., Inc. v. Hillsborough County, 722 F.2d 1526 (11th Cir. 1984); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) *rev'g* Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983).

333. *See supra* note 332.

334. *See* 28 U.S.C. § 1343 (1994).

plausible explanation is that the courts relied implicitly on *Shaw* as a basis for federal question jurisdiction.[335]

In sum, *Shaw*-like statutory preemption claims are offensive within the meaning of the well-pleaded complaint rule for precisely the same reason that the plaintiffs' claim in *Young* was offensive: plaintiffs threatened with a state or local government enforcement action sued government officers for prospective relief to block enforcement of a state or local law that allegedly conflicted with federal law. Analysis of U.S. Supreme Court and lower federal court decisions since *Shaw* bolsters the conclusion that *Shaw*-like statutory preemption claims are offensive for purposes of the well-pleaded complaint rule.

C. Young, Shaw, *and an Implied Right of Action Under the Supremacy Clause*

This section contends that *Young*, *Shaw*, and their progeny support the proposition that the Supremacy Clause creates an implied right of action for prospective relief against state and local government officers who violate, or threaten to violate, federal constitutional, statutory, or regulatory laws.

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335. Under the doctrine of "complete preemption," the preemptive force of certain federal statutes "is so powerful as to displace entirely any state cause of action" within the scope of a federal statutory cause of action, thereby transforming what would otherwise be a state law claim into a federal claim for purposes of federal question jurisdiction. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987). To date, the U.S. Supreme Court has found only two federal statutes to exert a sufficiently powerful pre-emptive force to warrant invoking the complete preemption doctrine: § 301 of the Labor-Management. Relations Act (LMRA) and § 502(a) of ERISA. *See Metropolitan Life*, 481 U.S. at 63–67.

None of the 15 U.S. Supreme Court cases cited in *supra* notes 311–30 involves § 301 of the LMRA, and none mentions complete preemption as a basis for federal question jurisdiction. However, three of the cases did involve preemption claims under ERISA. *See generally DeBuono*, 520 U.S. 806 (1997) (trustees of trust fund sued New York Commissioner of Health to enjoin enforcement of state tax law that was allegedly preempted by ERISA); California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc. 519 U.S. 316 (1997) (contractor on public works project sued California state agencies and officers for declaratory judgment that state labor law was preempted by ERISA); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (commercial insurers and trade associations sued New York state officials to enjoin enforcement of New York statute that was allegedly preempted by ERISA). ERISA preemption cases do not give rise to "complete preemption" unless the plaintiff has a cause of action under § 502(a). *See Metropolitan Life*, 481 U.S. at 63–64. Although the Court did not rely on § 502(a), the plaintiffs in *DeBuono* and *Travelers* may have had claims under § 502(a), in which case these could arguably be characterized as "complete preemption" cases.

For a helpful discussion of the distinction between the *Shaw* jurisdictional rule and the complete preemption doctrine, *see* Concerned Citizens, Inc. v. New York State Dep't of Envtl. Conservation, 127 F.3d 201, 206–07 (2d Cir. 1997).

However, in the case of statutory claims, Congress can override the presumed availability of such an implied right of action by expressing its intent to preclude such a cause of action.

The argument is divided into six sections. The first section discusses the policy implications of recognizing such an implied right of action. The second section demonstrates that the U.S. Supreme Court's decision in *Young* supports such an implied right of action. The third section demonstrates that U.S. Supreme Court and lower court decisions in statutory preemption cases support such an implied right of action. The fourth section shows that, in accordance with the U.S. Supreme Court's decision in *Seminole Tribe*, a *Young* right of action is not available in federal statutory cases if Congress intended to preclude the availability of a *Young* action for a particular statute. The final two sections address counterarguments that are likely to be raised. The fifth section addresses the counterargument that recognition of an implied right of action under the Supremacy Clause for statutory claims is inconsistent with the *Cort v. Ash*[336] line of cases. The final section addresses the counterargument that recognition of such an implied right of action would be inconsistent with the U.S. Supreme Court's § 1983 jurisprudence.

1. Policy Implications

As noted above, the *Young* doctrine is typically justified in terms of the need to vindicate the supremacy of federal law and promote the rule of law.[337] If individuals cannot obtain a judicial remedy for constitutional violations by state officers, the rule of law is undermined, and the supremacy of federal law is threatened. The same principle applies to state officers' attempts to enforce state laws that are preempted by federal statutes and to other federal statutory violations by state officers.

However, there are two competing principles that weigh against an excessively broad interpretation of the *Young* doctrine. First, in cases limiting the scope of the *Young* doctrine, the U.S. Supreme Court has relied heavily on the principle of state sovereign immunity, which is reflected in, but not limited by, the text of the Eleventh Amendment.[338] Second, creation

336. 422 U.S. 66 (1975).

337. *See supra* notes 242–44 and accompanying text.

338. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997) (holding that *Young* doctrine does not apply to tribe's suit against Idaho due to Idaho's "special sovereignty interests" in controlling its land and water); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105–06 (1984) (stating that

of remedies is primarily a legislative, not a judicial function.[339] The second principle has been relatively unimportant in cases raising constitutional claims within the scope of the *Young* doctrine, but it assumes greater significance in cases raising statutory claims where the plaintiff asserts an implied right of action under the *Young* doctrine because courts have generally been reluctant to imply rights of action for statutory claims.[340]

The argument for judicial deference to the legislature is quite powerful when applied to claims for money damages against private parties because such claims do not implicate the rule-of-law or federal supremacy concerns underlying the *Young* doctrine. Although rule-of-law and federal supremacy concerns are not wholly absent when plaintiffs sue state officers for money damages, a failure to compensate victims for past harms has a far less corrosive effect on the rule-of-law and federal supremacy interests than does a failure to prevent threatened or ongoing violations.

In contrast, the need for a private cause of action is strongest in suits for prospective equitable relief against state officers who violate federal law, because that is where the rule-of-law and federal supremacy concerns underlying the *Young* doctrine are presented in their most salient form. Moreover, in cases where plaintiffs seek judicial remedies against government officers in the absence of an express cause of action, courts have historically had broader powers to grant equitable remedies than legal remedies.[341] Recognition of an implied right of action for prospective equitable relief against state officers who violate federal law is not an affront to state sovereignty because the Supremacy Clause requires state officers to comply with supreme federal law. Finally, the principle of judicial deference to the legislature does not preclude judicial recognition of an implied right of action in such cases because all statutes are enacted against a background of traditional legal principles, including the principle that the federal judiciary is expected to enforce state officers' prospective

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"the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States").

339. *See* Bush v. Lucas, 462 U.S. 367, 388–90 (1983) (rejecting argument for judicial creation of *Bivens* remedy for alleged First Amendment violation because "Congress is in a better position to decide whether or not the public interest would be served by creating" such remedy).

340. *See infra* Part IV.C.5. Courts are more reluctant to recognize an implied right of action in statutory cases than in constitutional cases, because Congress has the opportunity to create an express private cause of action when it enacts a statute, whereas constitutional provisions rarely include an express cause of action.

341. *See infra* note 349 and accompanying text; *see also supra* note 221.

compliance with federal law,[342] absent evidence of legislative intent to preclude prospective relief. Thus, in suits for prospective equitable relief against state officers who violate federal law, the balance of competing policy interests tips in favor of an implied private cause of action.

A review of U.S. Supreme Court decisions indicates that the Court's willingness to imply a private cause of action to enforce federal statutes depends upon the identity of the defendant and the nature of the relief sought. In cases where plaintiffs sue private parties for violations of federal statutes, the Court has generally refused to recognize a private cause of action absent affirmative evidence of congressional intent to create a private right of action.[343] In cases where plaintiffs seek prospective equitable relief against state or local government officers for alleged violations of federal statutes, the Court has generally presumed the availability of a private cause of action, unless there is affirmative evidence of congressional intent to preclude a private right of action.[344] In cases where plaintiffs seek money damages against state or local government officers for alleged violations of federal statutes, the Court has generally refrained from adopting a strong presumption either for or against the availability of a private cause of action.[345] There are some exceptions to the broad generalizations stated above, but the following analysis shows that the exceptions reinforce the soundness of these basic rules.

2. Ex parte Young

In *Young*, the Court's decision to grant injunctive relief necessarily implies that the plaintiffs had a valid cause of action. But was it a state cause of action or a federal cause of action? One could argue that *Young* was effectively a precursor to *Smith v. Kansas City Title & Trust Co.*,[346] where state law created the cause of action, but where the case arose under

342. The principle that the federal judiciary is expected to enforce state officers' prospective compliance with federal law is the core of the *Young* doctrine. *See Coeur d'Alene*, 521 U.S. at 288 (O'Connor, J., concurring). Seminole Tribe v. Florida, 517 U.S. 44 (1996). That principle "is not an example of a novel rule that a proponent has a burden to justify affirmatively on policy grounds in every context in which it might arguably be recognized; it is a general principle of federal equity jurisdiction that has been recognized throughout our history and for centuries before our own history began." Seminole Tribe v. Florida, 517 U.S. 44, 177 (1996) (Souter, J., dissenting).

343. *See infra* Part IV.C.5.

344. *See infra* Parts IV.C.3–4.

345. *See infra* Part IV.C.6.

346. 255 U.S. 180 (1921).

federal law for purposes of federal question jurisdiction because "the right to relief depend[ed] upon the construction or application of the Constitution or laws of the United States."[347] However, this argument is at odds with Justice Peckham's opinion in *Young*, which made no attempt to identify a state law cause of action, and which appeared to assume that the plaintiffs' cause of action arose directly from federal law.[348] Moreover, U.S. Supreme Court decisions in the *Bivens* line of cases generally assume the availability of an implied federal cause of action for injunctive relief against both state and federal government officers who violate the Constitution.[349] Although the U.S. Supreme Court has never explicitly decided whether *Young* created (or recognized) an implied federal cause of action, several commentators have stated that an implied federal cause of action can be inferred from the Court's *Young* decisions.[350]

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347. *Id.* at 199; *see also supra* note 254.

348. *Young*, 209 U.S. at 143–45 (holding that lower court had jurisdiction because case "involved the decision of Federal questions arising under the Constitution of the United States," and stating that federal questions raised by case included: "whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law"; "[t]he sufficiency of rates with reference to the Federal Constitution"; and "the alleged unconstitutionality of these [state laws] because of the enormous penalties denounced for their violation").

349. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 404–05, (1971) (Harlan, J., concurring) (referring to "the presumed availability of federal equitable relief against threatened invasions of constitutional interests" and stating that "a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein."); *see also* Bush v. Lucas, 462 U.S. 367, 373–74 (1983) ("This Court has fashioned a wide variety of nonstatutory remedies for violations of the Constitution by federal and state officials."); Carlson v. Green, 446 U.S. 14, 42–44 (1980) (Rehnquist, J., dissenting) (contending that "federal courts have historically had broad authority to fashion equitable remedies," including injunctive relief against state officers who violate federal law, but that federal courts should not imply damages remedies for constitutional violations); Davis v. Passman, 442 U.S. 228, 242 (1979) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do.").

350. *See supra* note 234; *see also* Collins, *supra* note 258, at 1510–17 (discussing historical origins of implied rights of action for equitable relief against state and federal officers to vindicate constitutional rights); Hart, *supra* note 258, at 524 & n.124 (stating that *Young* was "crucial advance" in process whereby U.S. Supreme Court came "to treat the remedy of injunction as conferred directly by federal law for any abuse of state authority which in the view of federal law ought to be remediable"); Hart & Wechsler, *supra* note 116, at 1065 ("Moreover, isn't it clear that in *Young*, the Court recognized a judicially implied *federal* cause of action for injunctive relief under the Fourteenth Amendment?"); Hill, *supra* note 258, at 1126–27 (stating that argument that state law provided right of action in *Young* "collapses of its own weight"); Meltzer, *supra* note 4, at 38 (stating that *Young* "recognized an implied federal cause of action for an injunctive remedy against state officials whose conduct violates the Fourteenth Amendment"); Monaghan, *supra* note 4, at 130 (stating that *Young* "necessarily assumed the existence of an implied right of action for equitable relief against state officials").

Commentators disagree, however, about the source of that implied cause of action. Some commentators have suggested that the Fourteenth Amendment is the source of the *Young* cause of action.[351] Under this view, *Young* cannot provide a cause of action for violations of federal statutory or treaty rights because those rights are not derived from the Fourteenth Amendment.[352] Other commentators have explicitly linked the *Young* right of action to the Supremacy Clause.[353] Several lower federal courts have also endorsed this view.[354] The next section contends that the U.S. Supreme Court's decisions in *Shaw* and post-*Shaw* statutory preemption cases support the view that the *Young* right of action derives from the Supremacy Clause.

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351. *See* Hart & Wechsler, *supra* note 116, at 1065 (declaring that *Young* "recognized a judicially implied *federal* cause of action for injunctive relief under the Fourteenth Amendment"); Meltzer, *supra* note 4, at 38 (asserting that *Young* "recognized an implied federal cause of action for an injunctive remedy against state officials whose conduct violates the Fourteenth Amendment").

352. *See* Monaghan, *supra* note 4, at 131 (stating that implied right of action recognized by *Young* "is not relevant when a suit is based on a federal statute"). An implied right of action derived from the Fourteenth Amendment might be applicable to statutory violations where the statute is enacted pursuant to Congress' power under the Fourteenth Amendment. However, such a right of action would not be generally applicable to statutes, and would not apply to treaties at all.

353. *See* Wright & Miller, *supra* note 7 ("The best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws."); *see also supra* note 234.

354. *See* Burgio & Campofelice, Inc. v. NYS Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.") (quoting Wright & Miller, *supra* note 7 § 3566); Indian Oasis-Baboquivari Unified Sch. Dist. v. Kirk, 91 F.3d 1240, 1256 (9th Cir. 1996) (Reinhardt, J., dissenting on other grounds) (stating, in case where plaintiffs sought injunctive relief against enforcement of state law that was allegedly preempted by federal statute, that "it is the Supremacy Clause itself that provides plaintiffs with the right to sue . . . . Moreover, a plaintiff may sue directly under the Supremacy Clause even if the assertedly preemptive federal statute does not provide a cause of action or give rise to enforceable rights that could serve as the basis for a § 1983 suit on preemption grounds."); Guaranty Nat'l Ins. Co. v. Gates, 916 F.2d 508, 512 (9th Cir. 1990) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.") (quoting Wright & Miller, *supra* note 7, § 3566); Sprint Corp. v. Evans, 818 F. Supp. 1447, 1453 (M.D. Ala. 1993) (discussing preemption claims and Supremacy Clause, and concluding that "the U.S. Supreme Court has not questioned the propriety of allowing a cause of action for preemption claims even when the federal statute whose preemptive power is at issue cannot be the source of the plaintiff's cause of action"); Storer Cable Communications v. City of Montgomery, 806 F. Supp. 1518, 1529–30 (M.D. Ala. 1992) (same). *But see* Legal Envtl. Assistance Found. v. Pegues, 904 F.2d 640, 643–44 (11th Cir. 1990) (holding, in suit against state official to enjoin state regulatory action that was allegedly preempted by a federal statute, that it had subject matter jurisdiction under *Young* and *Shaw*, but that no private cause of action could be implied from Supremacy Clause).

3. *Statutory Preemption Cases*

The plaintiffs in *Shaw* were a group of employers who provided their employees with medical and disability benefits through employee benefit plans governed by the Employee Retirement Income Security Act (ERISA).[355] Their plans did not provide pregnancy-related disability benefits, as required by New York law. The employers filed suit in federal court against various New York officials, alleging that the New York statute that obligated them to provide pregnancy-related disability benefits was preempted by ERISA.[356] The U.S. Supreme Court agreed that ERISA preempted the state law "insofar as it [the state law] prohibits practices that are lawful under federal law."[357] The Court affirmed in part the injunctive relief awarded by the district court.[358]

The award of injunctive relief in *Shaw* necessarily implies that the plaintiffs had a valid cause of action, but the U.S. Supreme Court did not identify the source of that cause of action. Section 502(a) of ERISA created an express private cause of action for "participants," "beneficiaries," and "fiduciaries."[359] The *Shaw* plaintiffs were not "participants," or "beneficiaries," within the meaning of the statute,[360] nor does it appear that they were "fiduciaries."[361] Hence, their cause of action was not based on

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355. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 92 (1983).

356. *See id.*

357. *Id.* at 108. At the time, it was lawful under federal law for employers to choose not to provide pregnancy-related disability benefits. *See id.* at 88–89. New York law was preempted insofar as it made that choice unlawful. *See id.* at 108.

358. *See id.* at 93 n.9, 108–09.

359. *See* 29 U.S.C. § 1132(a) (1982) (specifying who is permitted to bring civil action under ERISA and for what types of claims).

360. 29 U.S.C. § 1002(7) (1982) (defining "participant" as employee or former employee "who is or may become eligible to receive a benefit . . . from an employee benefit plan"); 29 U.S.C. § 1002(8) (1982) (defining "beneficiary" as person "who is or may become entitled to a benefit").

361. The statute defines the term "fiduciary" to include, inter alia, a person who "exercises any discretionary authority or discretionary control respecting mgmt. of such [employee benefit] plan." 29 U.S.C. § 1002(21) (1982). On its face, the statutory language could be construed to include employers, such as the plaintiffs in *Shaw*. However, neither the U.S. Supreme Court decision nor any of the published lower court decisions indicates that the *Shaw* plaintiffs were "fiduciaries" within the meaning of ERISA. *See Shaw*, 463 U.S. 85, *aff'g in part, rev'g in part* Delta Air Lines, Inc. v. Kramarsky, 666 F.2d 21 (2d Cir. 1981), *aff'g in part, vac'g in part* Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287 (2d Cir. 1981), *aff'g in part, vac'g in part* Delta Air Lines, Inc. v. Kramarsky, 485 F. Supp. 300 (S.D.N.Y. 1980). Moreover, the U.S. Supreme Court's reliance on *Young* as a basis for federal question jurisdiction, *see supra* note 290 and accompanying text, strongly suggests that the Court *did not* consider the *Shaw* plaintiffs to be fiduciaries, because fiduciaries have an express cause of action under section

§ 502(a).[362] The Court's preemption holding in *Shaw* relied principally on § 514(a) of ERISA.[363] Although § 514(a) expressly preempts state law, it does not create an express private cause of action, and there is no indication in the U.S. Supreme Court opinion that the Court was deriving an implied cause of action from § 514(a). Thus, the *Shaw* plaintiffs' cause of action was not based on ERISA.[364]

The *Shaw* plaintiffs' cause of action could not have derived from the Fourteenth Amendment, because they did not assert any substantive rights arising under the Fourteenth Amendment. Nor did their cause of action arise under state law; they were asserting federal rights under ERISA to overcome what would otherwise have been binding state law obligations.[365] Since the plaintiffs' cause of action did not derive from ERISA, the Fourteenth Amendment, or state law, the best explanation is that their cause of action derived from the Supremacy Clause. This explanation finds support in footnote fourteen of *Shaw*,[366] which explicitly ties federal

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502(a) of ERISA, 29 U.S.C. § 1132(a) (1982). If the *Shaw* plaintiffs had an express cause of action under section 502(a), then federal jurisdiction would have been based on an express federal cause of action, and the Court's reliance on *Young* for jurisdiction would have been superfluous.

362. This conclusion is buttressed by subsequent lower court decisions in ERISA preemption cases, where courts have permitted plaintiffs to assert a *Shaw* cause of action, while holding expressly that plaintiffs lacked a cause of action under section 502(a). *See, e.g.*, Associated Builders & Contractors v. Perry, 115 F.3d 386, 388–89 (6th Cir. 1997) (stating that plaintiff's "cause of action does not request relief under 29 U.S.C. § 1132 . . . which is available only to participants, beneficiaries and fiduciaries" but concluding, based on *Shaw*, that plaintiffs could assert preemption claim); Burgio & Campofelice v. New York Dep't of Labor, 107 F.3d 1000, 1005–07 (2d Cir. 1997) (stating that plaintiff's claim is "not one commenced directly under" section 502(a), but relying on *Young* and *Shaw* to support the conclusion that plaintiff had implied cause of action under Supremacy Clause); Cigna Healthplan v. Louisiana, 82 F.3d 642, 644 n.1 (5th Cir. 1996) (stating that plaintiffs "do not seek to enforce against Louisiana any cause of action created by Congress," and citing *Shaw* in support of conclusion that plaintiffs had valid ERISA preemption claim).

363. *See* 29 U.S.C. § 1144(a) (1982) (stating that ERISA's provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA); *Shaw*, 463 U.S. at 96–100.

364. This conclusion is reinforced by the Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), decided the same day as *Shaw*. *See* 463 U.S. at 24–27 (holding that where defendant in state court action raises federal preemption defense based on section 514(a) of ERISA, and state court plaintiff *lacks* cause of action under section 502(a) of ERISA, claim does not present federal question); *cf.* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64–67 (1987) (holding that where defendant in state court action raises federal preemption defense based on section 514(a) of ERISA, and state court plaintiff has cause of action under section 502(a), claim does present federal question).

365. *See Shaw*, 463 U.S. at 88–92.

366. *See id.* at 96 n.14.

question jurisdiction to the Supremacy Clause and implicitly links the plaintiffs' cause of action to that Clause.

The thesis that the *Shaw* plaintiffs had an implied right of action under the Supremacy Clause is also supported by several post-*Shaw* statutory preemption cases. For example, in *Foster v. Love*,[367] a group of Louisiana voters sued the Governor of Louisiana, alleging that the state's "open primary" statute was preempted by federal election statutes.[368] Their central theory was that 2 U.S.C. §§ 1 and 7 require elections of U.S. Senators and Congressmen to take place in November,[369] whereas the Louisiana statute effectively advanced the date for some elections to October.[370] The Fifth Circuit held that the Louisiana statute was preempted and awarded the plaintiffs a declaratory judgment.[371] The U.S. Supreme Court affirmed the Fifth Circuit's judgment, without discussing the source of the plaintiffs' cause of action.[372]

The declaratory judgment in *Foster* necessarily implies that the plaintiffs had a valid cause of action, but the U.S. Supreme Court's opinion does not identify the source of that cause of action. A single sentence in the Fifth Circuit opinion in *Foster* provides the only clue concerning the source of the plaintiffs' cause of action. The Fifth Circuit majority cited *Shaw* and stated that "[w]e decide this case under our federal question jurisdiction to resolve a claim under the Supremacy Clause."[373] This statement suggests that the plaintiffs' cause of action sprang directly from the Supremacy Clause.

The preemptive federal statutes cannot be the source of plaintiffs' cause of action in *Foster* because those statutes do not create an express private

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367. 522 U.S. 67 (1997).

368. *Id.* at 70.

369. United States Code, title 2, section 1 provides, "At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter." 2 U.S.C. § 1 (1994). United States Code, title 2, section 7 provides, "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7 (1994).

370. *See Foster*, 522 U.S. at 69–70.

371. Love v. Foster, 90 F.3d 1026, 1031–32 (5th Cir. 1996), *aff'd*, Foster v. Love, 522 U.S. 67 (1997).

372. *See Foster*, 522 U.S. 67.

373. *Foster*, 90 F.3d at 1032 n.8.

right of action,[374] and there is no suggestion in either the Fifth Circuit or the U.S. Supreme Court opinion that the plaintiffs' right of action could be implied from those statutes. The *Foster* plaintiffs also presented claims under § 1983 and the Privileges and Immunities Clause. However, the Fifth Circuit expressly declined to consider either the § 1983 claim or the privileges and immunities claim.[375] Therefore, the plaintiffs' cause of action was not based on either § 1983 or the Fourteenth Amendment.[376] Therefore, the best explanation of Foster is that the plaintiffs' cause of action was implied from the Supremacy Clause.[377]

In *Morales v. Trans World Airlines*,[378] TWA, Continental, and British Air sued the Attorney General of Texas to enjoin enforcement of the Texas Deceptive Trade Practices Act, as applied to the airlines' fare advertising.[379] The litigation later expanded to include eleven other airlines and the attorneys general of thirty-three other states.[380] The airlines' preemption claim relied on an express preemption clause in the Airline Deregulation Act (ADA), which provides in part: "[N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or

374. *See supra* note 369.

375. 90 F.3d at 1032 n.8 ("The issues not considered in this opinion include whether plaintiffs have stated a claim for violation of the Privileges and Immunities Clause of the Fourteenth Amendment and whether plaintiffs have stated a claim enforceable under 42 U.S.C. § 1983.").

376. Although the Fifth Circuit avoided the § 1983 claim, it is clear that the plaintiffs did not have a valid § 1983 claim, because plaintiffs who assert federal statutory claims under § 1983 must show that they are "intended beneficiaries" of the statute, *see supra* notes 207–215 and accompanying text, and the federal election statutes, on their face, do not manifest an intent to benefit voters, *see supra* note 369.

377. An alternative explanation is that the plaintiffs' cause of action in both *Shaw* and *Foster* derived from the Declaratory Judgment Act. *See* 28 U.S.C. § 2201 (1994) ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . ."); 28 U.S.C. § 2202 (1994) ("Further necessary or proper relief based on a declaratory judgment or decree may be granted . . . ."). If one agrees that the *Shaw* jurisdictional principle applies to claims for declaratory relief, *see supra* note 300, then one could explain *Shaw* and its progeny as cases where *Young* and *Shaw* provide the basis for federal question jurisdiction, and the Declaratory Judgment Act provides the cause of action.

This author does not, in principle, reject this alternative explanation. However, it is well established that the Declaratory Judgment Act does not provide an independent basis of federal question jurisdiction. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 15–20 (1983). Therefore, even under the alternative explanation, federal jurisdiction ultimately relies on the Supremacy Clause, because that is the constitutional basis for the jurisdictional doctrine embodied in *Young* and *Shaw*.

378. 504 U.S. 374 (1992).

379. *See* Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 776 (5th Cir. 1990), *aff'd in part, rev'd in part*, 504 U.S. 374 (1992).

380. *See id.* at 775–76.

other provision having the force and effect of law relating to rates, routes, or services of any" airline governed by the ADA.[381] On the basis of this preemption provision, the Fifth Circuit upheld a district court order enjoining the state attorneys general from enforcing state deceptive advertising laws against advertising of fares by airlines,[382] and the U.S. Supreme Court affirmed.[383]

The award of injunctive relief in *Morales* necessarily implies that the plaintiffs had a valid cause of action. The published lower court opinions do not explicitly identify the source of that cause of action,[384] but the U.S. Supreme Court's opinion does shed some light on the issue. Justice Scalia, writing for the Court, raised the question of whether "the District Court could properly award respondents injunctive relief."[385] He noted that "[i]t is a 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'"[386] He continued:

> In *Ex parte Young*, we held that this doctrine does not prevent federal courts from enjoining state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." When enforcement actions are imminent—and at least when repetitive penalties attach to continuing or repeated violations and the moving party lacks the realistic option of violating the law once and raising its federal defenses—there is no adequate remedy at law. *We think Young establishes that injunctive relief was available here* . . . . Like the plaintiff in *Young*, then, respondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a

381. 49 U.S.C. App. § 1305(a)(1) (1988).

382. *See generally Mattox*, 897 F.2d at 780 ("We conclude that state laws proscribing deceptive advertising are preempted by § 1305(a)(1) when a state attempts to enforce such laws against the advertising of fares by interstate and international airlines."); *see also* Trans World Airlines, Inc. v. Morales, 949 F.2d 141, 143–45 (5th Cir. 1991) (upholding award of permanent injunction against 34 state attorneys general).

383. *Morales*, 504 U.S. at 383–91.

384. *See generally Morales*, 949 F.2d 141; *Mattox*, 897 F.2d 773; Trans World Airlines v. Mattox, 712 F. Supp. 99 (W.D. Tex. 1989).

385. *Morales*, 504 U.S. at 381.

386. *Id.* (quoting O'Shea v. Littleton, 414 U.S. 488, 499 (1974)).

> test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review.[387]

The statement that "*Young* establishes that injunctive relief was available here" is tantamount to saying that the plaintiffs had an implied right of action under the *Young* doctrine.[388] In *Morales*, that right of action could not be derived from the Fourteenth Amendment, because the only substantive right at issue was a statutory right rooted in the ADA.[389] The ADA's preemption clause does not create an express private cause of action.[390] None of the published opinions in *Morales* state that a right of action can be implied from the ADA, or that the plaintiffs' right of action is based on § 1983. Thus, the only plausible explanation of *Morales* is that the plaintiffs had an implied right of action under the Supremacy Clause.

In addition to *Foster* and *Morales*, the U.S. Supreme Court has decided at least ten other cases since *Shaw* in which it granted declaratory or injunctive relief to plaintiffs who raised statutory preemption claims against state or local government officers.[391] In two of these cases, the plaintiff's cause of action derived from § 1983.[392] In one case, the preemptive federal statute gave the plaintiffs a private right of action.[393] In the other seven cases, though, neither the U.S. Supreme Court opinions, nor the published lower court opinions rely on either § 1983 or the preemptive federal statute to establish plaintiffs' private right of action.[394]

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387. *Id.* (quoting Ex Parte Young, 209 U.S. 123, 156 (1908)) (emphasis added).

388. Moreover, the above-quoted language suggests that the elements of a *Young* cause of action are: (1) plaintiff has no adequate remedy at law, (2) plaintiff will suffer irreparable injury if equitable relief is denied, and (3) plaintiff is suing a state government officer to enjoin a threatened or ongoing violation of federal law. *See Morales*, 504 U.S. at 381. Additionally, Justice Scalia's opinion suggests that the first element is satisfied if enforcement actions are imminent, repetitive penalties attach to continuing or repeated violations, and the moving party lacks the realistic option of violating the law once and raising its federal defenses. *See id.*

389. The plaintiffs in *Morales* did raise both First Amendment and Commerce Clause claims; however, neither the district court nor the court of appeals addressed those claims. *See Morales*, 949 F.2d 141; *Mattox*, 897 F.2d 773; *Mattox*, 712 F. Supp. 99.

390. *See supra* note 381 and accompanying text.

391. *See infra* notes 392–395.

392. *See* Livadas v. Bradshaw, 512 U.S. 107 (1994) (holding that ruling by California Labor Commissioner was preempted by National Labor Relations Act); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) (holding that plaintiffs had valid claim under § 1983); Golden State Transit Corp. v. City of L.A., 475 U.S. 608 (1986) (affirming lower court's preemption holding).

393. Honig v. Doe, 484 U.S. 305 (1988) (holding that local school board order was preempted by Education of the Handicapped Act).

394. *See* Crosby v. National Foreign Trade Council, 120 S.Ct. 2288, 2302 (2000) (holding that Massachusetts law restricting trade with Burma was preempted by federal statute restricting trade with

As with *Shaw* and *Young*, the grant of relief in these seven cases necessarily implies that the plaintiffs had a valid cause of action. In each case, the fact that the courts did not mention § 1983 suggests that the plaintiffs were not relying on § 1983 to establish a private right of action. Similarly, the fact that the courts did not identify any cause of action under the preemptive federal statute suggests that the statute did not provide a cause of action. The Fourteenth Amendment cannot supply a right of action in any of these cases because the Court did not grant relief on the basis of Fourteenth Amendment rights.[395] Nor can state law supply the necessary private cause of action because the plaintiffs in every case asserted federal rights to block enforcement of state laws. The only remaining possibility is that the Supremacy Clause creates a right of action against state officers to enjoin enforcement of state laws that are preempted by federal statutes.

4. Seminole Tribe

Seminole Tribe[396] involved a suit by an Indian tribe against the State of Florida and its Governor, Lawton Chiles.[397] The tribe's principal allegation

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Burma); National Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999), *aff'g* National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998)); United States v. Locke, 529 U.S. 89 (2000) (holding that Washington state laws related to oil tankers were preempted by Oil Pollution Act of 1990 and other federal statutes), *rev'g* Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998), *aff'g in part, rev'g in part* Intertanko v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996); Barnett Bank v. Nelson, 517 U.S. 25 (1996) (holding that Florida law that prohibited banks from selling insurance was preempted by 12 U.S.C. § 92 (1994)), *rev'g* Barnett Bank v. Gallagher, 43 F.3d 631 (11th Cir. 1995); Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992) (holding that Illinois health and safety statute was preempted by Occupational Safety and Health Act), *aff'g* National Solid Wastes Mgmt. Ass'n v. Killian, 918 F.2d 671 (7th Cir. 1990); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (holding that Michigan statute regulating public utilities was preempted by Natural Gas Act), *aff'g* ANR Pipeline v. Schneidewind, 801 F.2d 228 (6th Cir. 1986), *rev'g* ANR Pipeline Co. v. Schneidewind, 627 F. Supp. 923 (W.D. Mich. 1985); Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256 (1985) (holding that state statute regulating distribution of federal funds was preempted by Payment in Lieu of Taxes Act), *rev'g* Lawrence County v. South Dakota, 668 F.2d 27 (8th Cir. 1982), *vac'g* Lawrence County v. South Dakota, 513 F. Supp. 1040 (D.S.D. 1981); Capital Cities Cable v. Crisp, 467 U.S. 691 (1984) (holding that Oklahoma law prohibiting advertising of alcoholic beverages on cable television was preempted by FCC regulations), *rev'g* Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983).

395. In *Crisp*, the District Court held that Oklahoma's ban on cable television advertising of alcoholic beverages violated the First Amendment (as applied to the states by the Fourteenth Amendment), and the Tenth Circuit reversed. *Crisp*, 699 F.2d at 498–502. The U.S. Supreme Court, though, held that Oklahoma's cable television advertising ban was preempted by FCC regulations. *See Crisp*, 467 U.S. at 705–09. The U.S. Supreme Court did not reach the First Amendment issue.

396. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

was that the defendants had violated, and were continuing to violate, a provision of the Indian Gaming Regulatory Act (IGRA) that obligated Florida to negotiate in good faith with Indian tribes toward the formation of a compact to regulate Indian gaming activities in the state.[398] The IGRA, which Congress enacted pursuant to the Indian Commerce Clause,[399] specifically authorized tribes to bring suit in federal court to compel a state to perform its duty to negotiate in good faith.[400] The Court's central holding was "that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore [IGRA] cannot grant jurisdiction over a State that does not consent to be sued."[401]

Having disposed of the tribe's claim against Florida on sovereign immunity grounds, the majority next considered whether the *Young* doctrine authorized the tribe's claim against the Governor. In the majority's opinion, the express cause of action against the State created by § 2710(d)(7)(A)(i)[402] did not authorize a *Young* action against the Governor.[403] Therefore, the only way that a suit against the Governor could have proceeded would have been on the basis of an implied federal cause of action. The majority did not explicitly reach the implied cause of action issue.[404] Instead, it decided that

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397. *See id.* at 51.

398. *See id.* at 48–52.

399. U.S. Const. art. I, § 8, cl. 3.

400. *See Seminole Tribe*, 517 U.S. at 47.

401. *Id.*

402. The United States Code provides:

> The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .

25 U.S.C. § 2710(d)(7)(A)(i) (1994).

403. *See Seminole Tribe*, 517 U.S. at 74–75 & n.17.

404. Even so, implicit in the majority's rationale is the assumption that the tribe would have had a valid implied cause of action against the governor if the case had fallen within the *Young* exception to Eleventh Amendment immunity. For example, in *Seminole Tribe* Chief Justice Rehnquist contended that the express cause of action under section 2710(d)(7)(A)(i) "would have been superfluous" if the duty to negotiate in good faith "could be enforced in a suit under *Ex parte Young*." *Id.* at 75. This statement makes sense only if one assumes that the *Young* doctrine supplies both an implied cause of action and an exception to sovereign immunity. If the *Young* doctrine supplies the latter, but not the former, then the express statutory cause of action would not have been superfluous.

Similarly, in *Seminole Tribe* the Chief Justice claimed that "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* This statement implies that, once a court decides that an action falls within the scope of the *Young* exception

the tribe's claim against the Governor did not fall within the *Young* exception to state sovereign immunity, because Congress had manifested its intent to preclude a *Young* action against the Governor by creating a detailed remedial scheme that imposed "upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*."[405]

In short, *Seminole Tribe* makes it clear that Congress has the power, when it enacts a statute, to foreclose the availability of a *Young* remedy for violations of that statute.[406] Therefore, in deciding whether to imply a *Young* remedy for a federal statutory violation, a court must ascertain whether Congress intended to foreclose the availability of such a remedy. Justice Souter, writing for the dissent in *Seminole Tribe*, would have courts insist "on a clear statement before assuming a congressional purpose" to foreclose the availability of a *Young* remedy.[407] The majority would not impose such a clear statement requirement.[408] However, it bears emphasis that the majority *would not* require a clear statement of an affirmative congressional intent to create a private right of action.[409] Rather, the majority opinion suggests that courts should adopt a presumption in favor of the availability of a *Young* remedy for prospective relief against state officers who violate federal statutes, but that presumption can be rebutted either by an explicit statement of congressional intent to preclude the remedy, or by showing that Congress "prescribed a detailed remedial scheme"[410] that gives rise to an inference that Congress intended to preclude the remedy.[411]

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to sovereign immunity, the court's general equitable powers enable it to grant any remedy that is consistent with the *Young* doctrine (including the bar against retroactive relief). It goes without saying, however, that a court cannot grant a remedy to a plaintiff who lacks a valid cause of action. Therefore, implicit in the Chief Justice's assertion is the proposition that the general equitable powers of the federal courts authorize them to imply a right of action for prospective relief whenever a plaintiff states a claim that falls within the *Young* exception to Eleventh Amendment immunity.

405. *Seminole Tribe*, 517 U.S. at 75–76.

406. The dissent in *Seminole Tribe* agreed with this proposition. *See id.* at 174 (Souter, J., dissenting) ("I do not in theory reject the Court's assumption that Congress may bar enforcement by suit even against a state official.").

407. *Id.* at 175.

408. *See id.* at 73–76.

409. *See id.*

410. *Id.* at 74.

411. The U.S. Supreme Court has applied essentially the same criterion in § 1983 cases raising federal statutory claims against state officers, *see supra* notes 189–92 and accompanying text, and in APA suits for injunctive relief against federal officers, *see supra* notes 143–50 and accompanying text. There is a subtle distinction, however, between the application of this criterion in the APA context, and its

5. *The* Cort v. Ash *Cases*

When viewed together, *Seminole Tribe* and the statutory preemption cases support two conclusions. First, the Supremacy Clause creates an implied right of action for injunctive relief against state officers who violate federal statutes. This includes a right of action against state officers to enjoin enforcement of state laws that are preempted by federal statutes. Second, Congress can foreclose the availability of such an implied right of action by manifesting its intent to preclude that remedy.

One possible objection to the first conclusion is that it is inconsistent with the *Cort v. Ash*[412] line of cases. In *Cort v. Ash*, the U.S. Supreme Court established a four-part test for determining whether to imply a private right of action from a federal statute that does not create an express private cause of action.[413] Subsequent cases, while frequently invoking the formula of the four-part test, generally refuse to imply a private right of action from federal statutes absent affirmative evidence of congressional intent to create a private cause of action.[414]

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application in the § 1983 context. In the APA context, there is a strong presumption that Congress did not intend to preclude judicial relief, and the Court requires clear and convincing evidence to overcome that presumption. *See supra* notes 145–46 and accompanying text. In the context of § 1983 suits for retroactive relief, the Court has been more willing to imply a legislative intent to foreclose a remedy. *See* Smith v. Robinson, 468 U.S. 992, 1009–13 (1984) (noting "Congress intended the EHA [Education of the Handicapped Act] to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education," because the EHA includes a comprehensive remedial scheme); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.").

In *Seminole Tribe*, Justice Souter contended that an APA-like approach should apply to *Young* suits for prospective relief against state officers. *Seminole Tribe*, 517 U.S. at 174–75 (Souter, J., dissenting) (contending that Court should not "recognize an intent to block the customary application of *Ex parte Young* without applying the rule recognized in our previous cases, which have insisted on a clear statement before assuming a congressional purpose to" foreclose remedy). In contrast, the majority opinion in *Seminole Tribe* adopted something closer to the § 1983 approach. *Id.* at 73–76.

412. 422 U.S. 66 (1975).

413. *Id.* at 78. The Court stated:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law . . . ?

Id. (citations and quotations omitted).

414. *See* Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527, 532–33 (1989) ("The 'ultimate issue is whether Congress intended to create a private cause of action.' Unless such

The cases in which the U.S. Supreme Court has refused to imply a private cause of action absent affirmative evidence of congressional intent typically involve claims against private parties.[415] In claims against private parties, it makes sense for courts to insist upon affirmative evidence of congressional intent to create a private cause of action for federal statutory violations, because the rule-of-law and federal supremacy concerns that support creation of a private remedy in *Young* cases are not present. Moreover, implication of a private cause of action in such cases would be contrary to principles of judicial deference to the legislative branch.[416]

California v. Sierra Club[417] is apparently the only case involving claims for prospective relief against state government officers in which the Court has applied the *Cort v. Ash* test.[418] In *Sierra Club*, an environmental organization and private citizens sought injunctive relief against state officers to prevent operation of certain water diversion facilities in California.[419] Plaintiffs alleged that operation of the facilities would violate

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'congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'") (citations omitted); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981) ("[T]he question whether a statute creates a private right of action is ultimately 'one of congressional intent.'") (citation omitted); TransAmerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979) ("[W]hat must ultimately be determined is whether Congress intended to create the private remedy asserted."); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) ("[I]n a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action, and we follow that stricter standard today. The ultimate question is one of congressional intent . . . ."); *see also* Hart & Wechsler, *supra* note 116, at 839–46.

415. *See Karahalios*, 489 U.S. 527, 529 (holding, in suit for money damages against labor union, that Title VII of Civil Service Reform Act of 1978 did not confer private cause of action on plaintiff); *Universities Research*, 450 U.S. 754, 768–70 (holding, in suit by former employee against non-profit consortium of universities, that Davis-Bacon Act did not confer private cause of action for damages on plaintiff); *TransAmerica Mortgage Advisors*, 444 U.S. 11, 24 (holding, in shareholder derivative action, that Investment Advisers Act of 1940 did not create private cause of action for damages); *Touche Ross*, 442 U.S. 560, 579 (holding, in suit for money damages against accountants, that Securities Exchange Act did not confer private cause of action on plaintiffs); *Cort*, 422 U.S. 66, 68–69 (refusing, in case where stockholder sued corporate directors for violation of federal criminal statute, to imply private cause of action for damages).

416. For a discussion of the application of *Cort v. Ash* to treaty-based claims against private parties, see Vázquez, *supra* note 8, at 1155–57.

417. 451 U.S. 287 (1981).

418. A portion of the Court's opinion in *Suter v. Artist M.*, 503 U.S. 347 (1992), also applies the *Cort v. Ash* test to a claim for prospective relief against a state government officer. *Id.* at 363–64. However, most of the Court's opinion is devoted to plaintiffs' § 1983 claims. *See id.* at 355–63. Accordingly, this Article treats *Suter* as a § 1983 case. *See infra* notes 433–35 and accompanying text.

419. *See Sierra Club*, 451 U.S. at 289. The complaint also named certain federal officers as defendants, *see id.* at 291, but the analysis here will focus on the claims against the state officers.

Section 10 of the Rivers and Harbors Appropriation Act of 1899 because the responsible state officials had failed to obtain a permit from the Corps of Engineers, which the Act required.[420] The Ninth Circuit, addressing the merits of the issue, concluded that operation of the facilities without the requisite permit might be a violation of federal law, depending upon the resolution of certain factual issues, which it remanded to the district court.[421]

The U.S. Supreme Court never reached the merits of the issue. It framed the question as whether "a private right of action can be implied on behalf of those allegedly injured by a claimed violation of § 10."[422] The Court emphasized that "the focus of the inquiry is on whether Congress intended to create a remedy. The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."[423] Finding that there was no "evidence that Congress anticipated that there would be a private remedy,"[424] the Court refused to imply a private right of action.

The U.S. Supreme Court's decision in *Sierra Club* was misguided because the Court applied the *Cort v. Ash* test to a case that should have been treated as a *Young* case. The plaintiffs' claim was clearly offensive for purposes of the well-pleaded complaint rule because the plaintiffs sought to enjoin ongoing actions by state officers that allegedly violated federal law.[425] The Ninth Circuit determined that the plaintiffs had standing to raise the claim,[426] and the U.S. Supreme Court did not reverse that ruling. If the U.S. Supreme Court had reached the merits and had found that the state officers were indeed violating federal law, it would have been well within the reach of the Court's traditional equitable powers to grant the requested relief—in other words, to order California officials to obtain the necessary federal permits.

The Court's apparent conclusion that issuance of such an injunction would be contrary to congressional intent[427] is bizarre. Assuming that the

420. *See id.* at 291–92.

421. Sierra Club v. Andrus, 610 F.2d 581, 605–07 (9th Cir. 1979), *rev'd*, California v. Sierra Club, 451 U.S. 287 (1981).

422. 451 U.S. at 290.

423. *Id.* at 297.

424. *Id.* at 298.

425. *See supra* notes 256–62 and 288–93 and accompanying text.

426. *Andrus*, 610 F.2d at 592–93.

427. *See Sierra Club*, 451 U.S. at 298 ("Nor is there any evidence that Congress anticipated that there would be a private remedy . . . . [W]e cannot consider the merits of a claim which Congress has not authorized respondents to raise.").

statute at issue in *Sierra Club* required the states to obtain a federal permit for state water projects, and assuming that the permit requirement applied to the specific project at issue in that case, there is no reason to assume that Congress *would not* want federal courts to enforce the permit requirement. The U.S. Supreme Court's approach—refusing to enforce the permit requirement without a specific congressional directive to do so—is tantamount to a general presumption that Congress wants the federal courts to acquiesce in ongoing violations of federal law by state officers. That presumption is at odds with the *Young* doctrine and with the reality of the legislative process.[428]

6. *Section 1983 Cases*

Another possible objection to the conclusion that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who violate federal statutes is that judicial recognition of such an implied right of action would be inconsistent with the legislative intent underlying 42 U.S.C. § 1983. Because § 1983 provides an express right of action for injunctive relief against state officers who violate federal statutes,[429] one could argue, courts should not supplement the congressionally created remedy by creating a judicial remedy for plaintiffs whose § 1983 claims are barred.

One response to this objection is that the U.S. Supreme Court has consistently upheld statutory preemption claims for injunctive relief against state officers without reference to § 1983.[430] Judicial recognition of implied rights of action in statutory preemption cases is justified, in part, by the fact that the plaintiffs in those cases sought only prospective equitable relief, not damages. In contrast, most of the Court cases in which plaintiffs raised federal statutory claims (as opposed to constitutional claims) pursuant to

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428. In *Seminole Tribe*, Justice Souter stated in his dissent:

> I do not in theory reject the Court's assumption that Congress may bar enforcement [of a federal law] by suit [for prospective relief] against a state official. But because in practice, in the real world of congressional legislation, such an intent would be exceedingly odd, it would be equally odd for this Court to recognize an intent to block the customary application of *Ex parte Young* without . . . a clear statement [of] congressional purpose [to preclude suits to enjoin ongoing violations of federal law by state officers].

517 U.S. 44, 174–75 (1996) (Souter, J., dissenting).

429. *See supra* Part III.C.

430. *See supra* Part IV.C.3.

§ 1983 have involved retroactive claims for money damages.[431] Thus, the criteria the Court has established for analyzing federal statutory claims under § 1983[432] were developed primarily in the context of cases that could not have been brought under the *Young* doctrine.

However, there are two U.S. Supreme Court cases raising federal statutory claims under § 1983 that fall within the scope of the *Young* doctrine because the plaintiffs sought only prospective relief against state officers.[433] In both cases, the Court denied the requested relief. In *Suter v. Artist M.*,[434] the Court's opinion is so inscrutable that it is difficult to determine the extent to which the Court relied on the established § 1983 criteria to justify its conclusion.[435] *Blessing v. Freestone*,[436] though, relied

431. *See* Livadas v. Bradshaw, 512 U.S. 107, 111–12 (1994) (involving plaintiff who sought payment of back wages); Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 504 (1990) (involving health care provider who sought reimbursement for past expenses related to Medicaid Act); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 104, 113 (1989) (reversing District Court decision that plaintiff was not entitled to compensatory damages); Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 421 (1987) (involving tenants who sought reimbursement for fees charged that exceeded limit set by federal statute); Smith v. Robinson, 468 U.S. 992, 995–98 (1984) (involving handicapped child who sought attorneys' fees and costs for suit to enforce federal right to educational assistance); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 4 (1981) (stating that issue presented is "the availability of a damages remedy"); Maine v. Thiboutot, 448 U.S. 1, 3–4 (1980) (affirming retroactive award of welfare benefits).

432. See *supra* notes 187–93 and accompanying text for a summary of these criteria.

433. *See* Blessing v. Freestone, 520 U.S. 329, 337 (1997) (involving mothers of children eligible to receive child support services from State who sued director of Arizona's child support agency, seeking declaratory and injunctive relief to mandate "affirmative measures sufficient to achieve as well as sustain substantial compliance with federal law"); Suter v. Artist M., 503 U.S. 347, 352 (1992) (involving class-action suit against officers of Illinois Department of Children and Family Services by plaintiffs who sought declaratory and injunctive relief to enforce compliance with federal law allegedly requiring state officers to "make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred").

434. 503 U.S. 347 (1992).

435. Indeed, the dissent chides the majority because "the Court reaches its conclusion without even stating, much less applying, the principles our precedents have used to determine whether a statute has created a right enforceable under § 1983." *Suter*, 503 U.S. at 365 (Blackmun, J., dissenting). Portions of the majority opinion suggest that the case was decided on the ground that the defendants did not violate any substantive provision of federal law. *See id.* at 358 (" [T]he Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the 16 listed features. Respondents do not dispute that Illinois in fact has a plan approved by the Secretary [that contains those features]"); *id.* at 361 ("The regulations promulgated by the Secretary . . . do not evidence a view that § 671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary."). Insofar as the Court's holding rests on the conclusion that the defendants did not violate any substantive federal law, it is fully consistent with the *Young* doctrine. Other portions of the opinion suggest that the case was decided on the ground that § 1983 did not provide a remedy for a violation of the federal statute at issue. *Id.* at 356 (stating that statute "did not create enforceable rights, privileges, or immunities within the

squarely on the established § 1983 criteria—in particular, the intended beneficiary criterion[437]—as a basis for denying prospective relief to plaintiffs who raised a *Young*-type claim.[438] Inasmuch as *Blessing* rejected plaintiffs' claim for prospective equitable relief against state officers on the ground that plaintiffs failed to establish that they were intended beneficiaries of the federal statute,[439] *Blessing* is inconsistent with *Shaw* and the other statutory preemption cases in which the Court has awarded prospective equitable relief without regard to whether the plaintiffs were intended beneficiaries of the federal statute. Thus, *Blessing* raises the issue whether, as a policy matter, plaintiffs who seek injunctive relief against state officers for federal statutory violations should be required to prove that they are intended beneficiaries of the statute.

This Article has emphasized that the *Young* doctrine is justified by the federal interest in promoting the supremacy of federal law and vindicating the rule of law.[440] In cases where a state or local government officer has violated a federal statute, but the violation has ended, and the plaintiff is denied retroactive relief on the grounds that he or she is not an intended beneficiary of the statute, the denial of relief does not raise significant concerns about federal supremacy or the rule of law.[441] Moreover, an award of money damages in such a case would contravene Congressional intent by conferring a private benefit on someone whom the statute was not intended to benefit. Therefore, in § 1983 suits against state and local government officers for money damages, it makes sense to limit the class of eligible plaintiffs to intended beneficiaries of the statute.

In contrast, where a state or local government officer is engaged in an ongoing violation of a federal statute, and a plaintiff with standing to sue presents an actual controversy that is ripe for decision, if the court denies

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meaning of § 1983"). Insofar as the Court's holding rests on its ostensible inability to provide prospective relief for an ongoing statutory violation, that holding is inconsistent with the *Young* doctrine.

436. 520 U.S. 329 (1997).

437. One key criterion limiting the availability of § 1983 remedies for federal statutory violations is that "Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340; *see also supra* notes 207–14 and accompanying text.

438. *See Blessing*, 520 U.S. at 343–44.

439. *See id.*

440. *Supra* notes 242–44.

441. For a contrary view, see Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1777–85 (1997) (contending that Supremacy Clause establishes implied right of action for damages remedy against state officers who have committed past violations of federal law).

prospective equitable relief on the grounds that the plaintiff is not an intended beneficiary of the statute, the court's refusal to provide a remedy is tantamount to judicial complicity in the government officer's ongoing violation of federal law. That raises very serious concerns about the rule of law and the supremacy of federal law. Therefore, a plaintiff's failure to satisfy the intended beneficiary criterion applied in § 1983 suits for money damages should not bar a *Young* action for injunctive relief.[442]

There may be cases in which the political branches clearly intended to rely on the executive branch, and not private attorneys general, to remedy ongoing violations of federal statutes by state officers. In such cases, judicial refusal to provide prospective relief to a private plaintiff is not complicity in an ongoing violation of federal law, but rather appropriate judicial deference to the political branches. However, such cases are effectively addressed by inquiring whether Congress specifically foreclosed a private remedy—an inquiry that is doctrinally required in both § 1983 and *Young* cases.[443] In cases where the political branches did not foreclose a private remedy, though, it would be an abdication of judicial responsibility to deny prospective relief, in reliance on the intended beneficiary criterion, to a plaintiff who alleges an ongoing violation of a federal statute by a state or local government officer.

In sum, *Young, Shaw*, and the post-*Shaw* statutory preemption cases demonstrate that there is an implied right of action under the Supremacy Clause for claims for injunctive relief against state officers who violate federal statutes. *Seminole Tribe* establishes that Congress can foreclose the availability of such an implied right of action by manifesting its intent to preclude that remedy. The *Cort v. Ash* line of cases is distinguishable because the affirmative intent test utilized in those cases is properly applied only to claims against private parties. Finally, the § 1983 statutory cases are distinguishable because the intended beneficiary criterion applied in those cases makes sense only in the context of claims for money damages.

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442. There is an additional reason why application of the intended beneficiary requirement in suits for injunctive relief is not justified. An award of injunctive relief against government officers frequently benefits a wide class of people other than the nominal plaintiff. The U.S. Supreme Court's APA jurisprudence effectively accounts for the public benefit aspect of suits for injunctive relief against government officers by applying a fairly broad interpretation of the zone-of-interests test. *See supra* notes 161–66 and accompanying text. In contrast, strict application of the intended-beneficiary criterion in cases such as *Blessing*, where plaintiffs seek equitable relief against state or local government officers, fails to account for the public benefit aspect of such suits.

443. *See supra* notes 189–92, 396–408 and accompanying text.

D. Young, Shaw, *and Treaty-Based Preemption Claims*

Having established that the Supremacy Clause creates an implied right of action against state officers to enjoin enforcement of state laws that are preempted by federal statutes, this section contends that the implied right of action also extends to some treaty-based preemption claims. The argument is divided into three sections. The first section distinguishes between four types of treaty provisions and shows that the question of implied rights of action pertains only to one of those four types. The second section addresses the applicability of *Young* and *Shaw* to treaty claims generally. The final section focuses specifically on human rights treaties.

1. Four Types of Treaty Provisions

Part II of this Article distinguished three different meanings of the term non self-executing, as applied to treaty provisions. Some non-self-executing treaty provisions have no domestic legal effect in the absence of implementing legislation.[444] Other non-self-executing treaty provisions have domestic legal effect, but separation of powers principles preclude U.S. courts from providing judicial remedies for violations of treaty rights.[445] A third meaning of non-self-execution is that treaty provisions do not create private rights of action; under this interpretation, judicial remedies are available in some cases.[446]

This distinction between three different meanings of the term non self-executing leads to a four-fold classification of treaty provisions. Type I treaty provisions are fully self-executing, meaning that they create private rights of action. Type II treaty provisions are judicially enforceable in some cases, but do not create private rights of action. Type III treaty provisions have domestic legal effect, but are not judicially enforceable. Finally, Type IV treaty provisions have no domestic legal effect in the absence of implementing legislation.

Assuming that the Supremacy Clause creates an implied right of action against state officers to enjoin enforcement of state laws that are preempted by treaty provisions, that right of action would not apply to Type IV treaty provisions, because they are not the law of the land under the Supremacy

444. *See supra* notes 74–79 and accompanying text; *see also* Sloss, *supra* note 19, at 146–47.

445. *See supra* notes 80–83 and accompanying text; *see also* Sloss, *supra* note 19, at 147–49.

446. *See supra* notes 84–87 and accompanying text; *see also* Sloss, *supra* note 19, at 151–52.

Clause.[447] Nor would such an implied right of action apply to Type III treaty provisions, because separation of powers principles preclude judicial enforcement of such treaty provisions.[448] Moreover, an implied right of action is not necessary for Type I treaty provisions, because Type I treaty provisions contain their own right of action.[449] Thus, the question of an implied right of action under the Supremacy Clause pertains only to Type II treaty provisions.[450]

2. *Treaty-Based Preemption Claims Against State Officers*

The U.S. Supreme Court has not explicitly decided whether the *Young* exception to the Eleventh Amendment applies to cases alleging violations of federal treaties by state officers. However, the courts of appeals that have addressed the issue agree that the *Young* exception to state sovereign immunity is broad enough to encompass violations of federal treaties by

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447. *See Restatement (Third) of the Foreign Relations Law of the United States* § 115(3) (1987) ("A rule of international law or a provision of an international agreement of the United States will not be given effect as law in the United States if it is inconsistent with the United States Constitution."); *id.* § 111 cmt. i ("An international agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve what lies within the exclusive law-making power of Congress under the Constitution.").

448. For example, even though the Administrative Procedure Act creates a right of action for injunctive relief against federal officers to enforce some treaty-based claims, *see supra* Part III.B, courts probably would not entertain a claim against the Secretary of Defense alleging a violation of a U.S.-Russian arms-control agreement because separation-of-powers principles dictate that the task of ensuring U.S. compliance with its arms control treaty obligations is an executive branch function, not a judicial function. *See* Vazquez, *supra* note 74, at 717.

449. *See* ICCPR, *supra* note 12, art. 9, ¶ 4 ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.").

450. Some may contend that the class of Type II treaty provisions is a null set. According to this view, courts distinguish between self-executing treaty provisions, which are judicially enforceable, and non-self-executing treaty provisions, which are not judicially enforceable. Thus, one could argue, there is no middle category of non-self-executing treaty provisions that are judicially enforceable.

A detailed response to this argument is beyond the scope of this Article. However, it is worth noting that there are lower court decisions that support limited judicial enforcement of non-self-executing treaty provisions. *See, e.g.*, Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) (stating "that because the ICCPR is not self-executing, Ralk can advance no private right of action under that document" but noting that "Ralk could bring a claim under the Alien Tort Claims Act for violations of the ICCPR"); Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (noting that Vienna Convention is not self-executing in sense that it does not confer "rights of action on private individuals," but holding that "Paraguay has standing to seek redress for violations," and that "this Court has the power to interpret the treaties and fashion an equitable remedy"). For a more detailed analysis of judicial enforcement of treaties that do not create a private right of action, see Vázquez, *supra* note 8, at 1143–57.

state officers.[451] Moreover, in one case where the Eighth Circuit explicitly relied on *Young* to overcome an Eleventh Amendment defense to a treaty-based claim, the U.S. Supreme Court upheld the plaintiffs' treaty-based claim for injunctive relief against state officers, without discussing the lower court's resolution of the Eleventh Amendment issue.[452] Even the cases in which courts of appeals have invoked the Eleventh Amendment to bar treaty-based claims against state officers have tacitly acknowledged the general applicability of *Young* to such claims.[453] Therefore, the Eleventh Amendment does not bar claims against state officers to enjoin future enforcement of state laws that are preempted by treaty provisions.

This author has not identified any published judicial decision that explicitly addresses the precise question whether treaty-based preemption claims for injunctive relief against state officers are offensive claims for purposes of the well-pleaded complaint rule. However, there is at least one U.S. Supreme Court decision holding that a treaty-based claim for damages

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451. *See* Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 913–14 (8th Cir. 1997) *aff'd*, 526 U.S. 172 (1999) (holding, based on *Ex parte Young*, that Eleventh Amendment does not bar plaintiffs' treaty-based claims for prospective relief against Minnesota Commissioner of Natural Resources); Fond du Lac Band of Chippewa Indians v. Carlson, 68 F.3d 253, 255–56 (8th Cir. 1995) (holding that treaty-based claim against governor of Minnesota "falls squarely within the doctrine of *Ex parte Young*"); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 365 (7th Cir. 1983) (relying implicitly on *Young* exception to sovereign immunity in action for declaratory judgment against Wisconsin state officials to support judgment for Indian plaintiffs whose treaty rights were violated); *see also* Christopher L. Lafuse, Note, *Beyond* Blatchford v. Native Village of Noatak*: Permitting the Indian Tribes to Sue the States*, 26 Val. U. L. Rev. 639, 653–54 (1992) (contending that *Young* allows federal court to grant injunctive relief to force state official to comply with terms of federal treaty).

452. *Mille Lacs Band*, 526 U.S. 172 (affirming lower court order in favor of Indian tribes who sought declaratory and injunctive relief against Minnesota officials to enforce hunting and fishing rights based on 1837 treaty). The U.S. Supreme Court opinion addressed two separate cases that were consolidated on appeal. *See id.* at 185–87. In *Fond du Lac*, the Eight Circuit's Eleventh Amendment holding rested exclusively on the *Young* doctrine, because the United States never intervened in that case. 68 F.3d at 255–57. The United States did intervene in the *Mille Lacs* case. 124 F.3d at 912–14. Accordingly, the Eighth Circuit rejected Minnesota's Eleventh Amendment defense in the *Mille Lacs* case on two independent grounds: (1) the *Young* doctrine and (2) the fact of U.S. intervention. *See id.*

453. *See* Republic of Paraguay v. Allen, 134 F.3d 622, 627 (4th Cir. 1998) (deciding that, in action seeking declaratory and injunctive relief against Governor of Virginia for alleged treaty violation, *Young* exception to Eleventh Amendment did not apply because "the violation alleged here is not an ongoing one for *Ex parte Young* purposes and . . . the essential relief sought is not prospective"); United Mexican States v. Woods, 126 F.3d 1220, 1223 (9th Cir. 1997) (holding that, in suit against Arizona attorney general for alleged treaty violation, "request for a 'declaration' that Arizona's past conduct violated the treaties does not convert the action into one for prospective relief," and "*Young* exception is inapplicable because Mexico alleges no continuing violations of federal or international law.").

against a local government satisfied the well-pleaded complaint rule.[454] Moreover, given that statutory preemption claims for injunctive relief against state officers are offensive, the thesis that treaty-based preemption claims for injunctive relief against state officers are defensive is unsupportable as a matter of both logic and principle. Therefore, such claims should be considered offensive for purposes of the well-pleaded complaint rule.

The more difficult question is whether the Supremacy Clause creates an implied right of action against state officers to enjoin enforcement of state laws that are allegedly preempted by Type II treaty provisions. To some extent, the policy implications of this question are similar to the policy issues that pertain to statutory preemption claims.[455] As with statutes, rule of law and federal supremacy concerns, together with courts' general equitable powers, support the implication of a right of action in appropriate cases. In contrast, principles of state sovereignty and judicial deference to the political branches weigh against judicial implication of remedies.

Apart from the above considerations, which apply to both statutes and treaties, there is at least one additional factor that supports an implied cause of action under the Supremacy Clause for treaty-based preemption claims for injunctive relief against state officers. A judicial decision to dismiss a treaty-based claim against a state officer, on the grounds that the plaintiff lacks a private right of action, may in some cases result in U.S. noncompliance with its treaty obligations. In such cases, the policy objective of ensuring U.S. compliance with its treaty obligations supports judicial recognition of an implied cause of action under the Supremacy Clause, at least for Type II treaty provisions.[456]

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454. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974) (holding, in case where Indian tribes who sued counties in federal court to recover damages representing fair rental value of land in which they asserted property right, and where court of appeals dismissed for failure to satisfy well-pleaded complaint rule, that "the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States.").

455. *See supra* Part IV.C.1.

456. *See* Murray v. Schooner Charming Betsy, 6 U.S. (1 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The U.S. Supreme Court has invoked this maxim not only to avoid conflicts with general principles of international law, but also to avoid conflicts with specific provisions of international agreements. *See* Weinberger v. Rossi, 456 U.S. 25, 36 (1982) (holding that employment discrimination statute did not abrogate executive agreements between United States and foreign countries providing for preferential hiring of local nationals on U.S. military bases overseas). Although the maxim is typically applied in cases involving statutory construction, *see* Sloss, *supra* note 19, at 206 & n.368, the underlying principle applies with equal force in cases where courts are determining the scope of a

One could argue that courts should be more hesitant to create implied rights of action in treaty cases than in statutory cases, because treaties generally regulate relations between nations, not relations between individuals and governments. This argument is not without merit, but it is best understood in terms of the distinction between Type II and III treaty provisions. Treaty provisions that merely regulate relations between nations are generally treated as Type III provisions, which are not judicially enforceable.[457] However, treaty provisions that regulate relations between individuals and governments are generally treated as Type I or II treaty provisions, which are judicially enforceable.[458] Thus, the fact that Type III treaty provisions regulate relations between nations does not weigh against judicial recognition of implied rights of action in cases where plaintiffs base their claims on Type II treaty provisions.

3. *Claims Based on Human Rights Treaties*

Recall the previous hypothetical, in which Michael Hardwick was arrested in 1999 for engaging in private consensual sexual activity with another adult male.[459] Assume that he was charged with violating the state sodomy law, but the prosecutor dropped the charges.[460] In this hypothetical case, Hardwick sued the state attorney general in federal district court for prospective injunctive relief, claiming a right of action under the Supremacy Clause. He alleged that the state sodomy law is invalid, as applied to private consensual sexual activity, because it conflicts with Article 17 of the

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judicially created remedy. Therefore, a judicially created remedy should not be construed to violate a treaty if any other reasonable construction is possible.

457. *See* Head Money Cases, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and . . . the honor of the governments which are parties to it . . . . [W]ith all this the judicial courts have nothing to do and can give no redress.").

458. In the *Head Money Cases*, the Court stated that

> [some treaty] provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

See id. at 598–99

459. *See supra* notes 195–96 and accompanying text.

460. In the actual case, Hardwick was arrested and charged, but "the District Attorney's office decided not to present the case to the grand jury unless further evidence developed." Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev'd*, 478 U.S. 186, 192 (1986).

ICCPR.[461] Assume that Hardwick's past arrest is sufficient to give him standing,[462] and that his claim presents an actual controversy that is ripe for adjudication.

The preceding analysis establishes that the Eleventh Amendment does not bar Hardwick's claim and that his claim satisfies the well-pleaded complaint rule.[463] The issue, therefore, is whether the implied right of action under the Supremacy Clause is sufficiently broad to permit the court to entertain Hardwick's claim. The argument in favor of an implied right of action is essentially as follows. Article 17 of the ICCPR is clearly intended to confer rights on individuals and is therefore judicially enforceable (Type II). Although the ICCPR itself does not create a private cause of action, the court's traditional equitable powers enable it to fashion an equitable remedy for injunctive relief against state government officers who violate treaty rights.[464] Failure to provide such a remedy would be contrary to the rule-of-law and federal supremacy principles underlying the *Young* doctrine. Judicial refusal to reach the merits of Hardwick's claim would constitute a breach of the U.S. treaty obligation under Article 2(3) of the ICCPR to ensure that a "competent authority" determines Hardwick's right to a remedy;[465] it would also be contrary to the treaty makers' intent to comply with the United States's obligation under Article 2(3).[466]

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461. *See supra* notes 53–58 and accompanying text (discussing Article 17 and state sodomy laws).

462. In the actual case, the Eleventh Circuit held that Hardwick's past arrest, "combined with the continuing resolve on the part of the State to enforce the sodomy statute against homosexuals and the authenticity of Hardwick's desire to engage in the proscribed activity in the future" was sufficient to establish Hardwick's standing to bring the claim. *See Hardwick*, 706 F.2d at 1206.

463. *See supra* notes 451–54 and accompanying text.

464. *See supra* notes 221, 349, & 384–89 and accompanying text.

465. The ICCPR obligates the United States "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" and "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by . . . [a] competent authority provided for by the legal system of the State." ICCPR, *supra* note 12, art. 2, ¶ 3. This language, on its face, obligates the United States to ensure that individual claimants receive an individual hearing before an impartial tribunal. Therefore, a generalized determination by the political branches that Article 17 protects only redundant rights is not sufficient to satisfy the U.S. obligation under Article 2(3). In the hypothetical Hardwick case, the courts are the only "competent authority provided for by the legal system" of the United States. Thus, if the court dismisses Hardwick's claim without deciding whether his treaty rights have been violated, the United States would be in breach of its Article 2(3) obligation to ensure that Hardwick's right to a remedy is determined by a competent authority.

466. The fact that the United States did not adopt a reservation with respect to Article 2(3) shows that the treaty makers intended for the United States to comply with Article 2(3). Hence, the court's failure to reach the merits of Hardwick's claim would be contrary to the intent of the treaty makers.

The non-self-executing (NSE) declaration attached to the ICCPR does not preclude judicial enforcement of the treaty; it merely signifies that the treaty does not create a private right of action. Hardwick would be relying on the Supremacy Clause, not the treaty, to establish a private right of action. Therefore, the NSE declaration would not bar Hardwick's claim. Moreover, the *Seminole Tribe* limitation on the implied right of action under the Supremacy Clause is analogous to the bar on § 1983 actions where Congress has foreclosed such enforcement,[467] and to the bar on APA actions where "statutes preclude judicial review."[468] This Article has already established that the treaty makers did not foreclose enforcement of the ICCPR pursuant to § 1983,[469] nor did they preclude judicial review of ICCPR claims brought pursuant to the APA.[470] The same rationale demonstrates that *Seminole Tribe* would not be a bar to Hardwick's claim.

One objection to this line of argument is that the NSE declaration effectively converted Article 17 of the ICCPR from a Type II (or Type I) treaty provision into a Type III treaty provision, thereby precluding judicial enforcement altogether. This argument was rejected above,[471] and does not merit further discussion.

A more subtle objection to the preceding argument is as follows. Assuming that Article 17 of the ICCPR, as modified by the NSE declaration, is a Type II treaty provision, there are at least three possible ways to draw the line between permissible and impermissible judicial remedies for violations of Article 17. The conservative approach would permit defensive remedies for Article 17 violations but prohibit offensive remedies.[472] The moderate approach would permit remedies based upon express rights of action, such as the APA, but prohibit remedies based upon implied rights of action. The liberal approach would permit claims for

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467. *See supra* note 411.

468. 5 U.S.C. §701(a)(1) (1994).

469. *See supra* notes 189–92 and accompanying text. The preceding analysis showed that § 1983 claims for human rights treaty violations are barred because of the "intended beneficiary" criterion, not because Congress foreclosed enforcement. *See supra* part III.C. *Seminole Tribe* does not say that the plaintiff must be an intended beneficiary of the statute in order to bring a *Young* claim for a federal statutory violation. *Seminole Tribe* merely says that a *Young* claim is barred if Congress intended to foreclose the availability of a *Young* remedy. *See supra* part IV.C.

470. *See supra* notes 143–50 and accompanying text.

471. *See supra* notes 96–103 and accompanying text.

472. In other words, Hardwick could invoke Article 17 as a defense to a state criminal prosecution, but he could not initiate a civil action against the state or its officers.

prospective equitable relief under *Young* and the APA, but prohibit claims for money damages under the FTCA or § 1983. The preceding argument effectively endorses the liberal approach, based on the premise that Article 17 is a Type II treaty provision, but fails to address the argument that the moderate and conservative approaches are also consistent with the classification of Article 17 as a Type II treaty provision. Moreover, one could argue, the moderate and conservative approaches are preferable to the liberal approach, because the liberal approach is inconsistent with the plain meaning of the NSE declarations and with the treaty makers' intent to minimize the domestic legal impact of treaty ratification.

All three approaches are consistent with the classification of Article 17 as a Type II treaty provision. However, the conservative approach is problematic because it would deny plaintiffs a right of action under the APA for injunctive relief against federal officers who violate unique treaty rights. This result is inconsistent with established APA jurisprudence.[473] The moderate approach is also problematic because it would create an unjustified disparity between victims of human rights violations committed by federal government officers and victims of human rights violations committed by state and local government officers. Under the moderate approach, the former group could obtain injunctive relief against federal officers pursuant to the APA. However, the latter group could not obtain relief at all: § 1983 claims would be barred by the intended beneficiary criterion[474] and *Young* claims would be barred by the moderate approach's arbitrary exclusion of claims based on implied rights of action. There is no persuasive policy justification for this disparity.[475]

With respect to the plain meaning argument, it is instructive to compare the NSE declarations to a statutory provision in the Prison Litigation Reform Act, which states: "No Federal civil action may be brought by a prisoner confined in jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[476] Despite the clear statutory command that no "Federal

473. *See supra* Part III.B.

474. *See supra* notes 207–14 and accompanying text.

475. It is no answer to say that courts should prefer express rights of action over implied rights of action. One could as easily argue that courts should prefer a constitutionally created implied right of action (under the Supremacy Clause) to a statutorily created express right of action, because the former is constitutional, whereas the latter is statutory.

476. 42 U.S.C. § 1997e(e) (Supp. IV 1998).

civil action may be brought," every federal appellate court that has addressed the issue has concluded that this provision limits damages remedies, but does not impair a prisoner's right to seek declaratory or injunctive relief.[477] The rationale for this result is straightforward: "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction."[478] Inasmuch as a statutory provision that bars any federal civil action has been uniformly construed to permit actions for injunctive relief, it is unpersuasive to suggest that the plain meaning of the NSE declarations bars suits for injunctive relief.

More fundamentally, the above objection highlights the problem created by the treaty makers' refusal to confront the difficult trade-offs between the twin policy goals of ensuring compliance with U.S. treaty obligations and avoiding changes in domestic law.[479] In cases where plaintiffs assert rights that are, in fact, unique treaty rights, any decision that the court makes will inevitably be inconsistent with at least one of the treaty makers' policy goals. A decision to grant relief would be inconsistent with the goal of avoiding changes in domestic law. A decision to deny relief would be inconsistent with the goal of treaty compliance.

Even so, the liberal approach comes closest to harmonizing these conflicting policy goals. Under the conservative or moderate approach, every case in which a court refused to reach the merits of a treaty-based human rights claim on the grounds that the plaintiff lacked a private right of action would be a separate violation of the United States's obligation to ensure that a competent authority determines the plaintiff's right to a remedy.[480] Moreover, every such judicial decision (or non-decision) would be contrary to the policy goal of treaty compliance.

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477. *See* Harris v. Garner, 190 F.3d 1279, 1288 (11th Cir. 1999), *vacated, reh'g granted en banc*, 197 F.3d 1059 (11th Cir. 1999), *reinstated in relevant part*, 216 F.3d 970 (11th Cir. 2000) (en banc); Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 808 (10th Cir. 1999); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998); Zehner v. Trigg, 133 F.3d 459, 462 (7th Cir. 1997).

478. Califano v. Yamasaki, 442 U.S. 682, 705 (1979). The cases cited in the previous footnote rely upon other arguments as well, but the principle articulated in *Califano* is an important part of the rationale supporting the courts' narrow interpretation of the no "Federal civil action" provision of the Prison Litigation Reform Act.

479. *See supra* notes 64–66, 102–03, and accompanying text.

480. This statement is subject to two caveats. First, if the court grants complete relief on the basis of some other provision of domestic law, there is no international obligation to reach the merits of the treaty

In contrast, suppose that courts uniformly adopted the liberal approach and recognized an implied private right of action under the Supremacy Clause. In some cases, courts would hold that defendants had violated plaintiffs' treaty rights. But in other cases, courts would hold that there was no treaty violation. In cases where courts found no treaty violation, their decisions would be fully consistent with both policy goals. By addressing the merits, they would be promoting the goal of treaty compliance and fulfilling the United States's obligation to ensure that a competent authority determines the plaintiff's right to a remedy.[481] But by holding that there was no treaty violation, the court would avoid changes in domestic law. Therefore, the liberal approach is consistent with both policy goals, at least some of the time. In contrast, the conservative and moderate approaches yield repeated judicial decisions that are inconsistent with the policy goal of treaty compliance.

V. CONCLUSION

When the political branches create federal law, whether by statute or treaty, injunctive relief is presumptively available against state or local government officers who violate that federal law. That presumption flows from the Supremacy Clause; it is necessary to preserve the rule of law and to vindicate the federal interest in the supremacy of federal law. The presumption can be rebutted by showing that Congress foreclosed the availability of a *Young* remedy when it enacted a statute, or that the treaty makers foreclosed the availability of a *Young* remedy when they adopted a treaty. However, the burden of proof properly rests with the party who seeks to preclude judicial enforcement of federal law to show that Congress, or the treaty makers, specifically intended to foreclose the availability of a *Young* remedy. It would be incompatible with the rule-of-law and federal supremacy interests underlying the *Young* doctrine to shift the burden of proof to the party seeking to enjoin a violation of federal law.

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claim. *See* Sloss, *supra* note 19, at 204–07. Second, there is no international obligation to reach the merits of frivolous treaty-based claims. *See id.* at 203–04.

481. One could argue that an incorrect judicial decision—holding that there was no treaty violation when in fact the treaty had been violated—would be inconsistent with U.S. international obligations. This argument fails to account for the fact that there is no international body with final authority to decide whether particular conduct constitutes a treaty violation. In the absence of any such international body, a good-faith judicial effort to reach a fair decision on the merits of plaintiff's claim would satisfy the United States's treaty obligation, regardless of the results of that decision.

Most commentators have assumed that the NSE declarations attached to human rights treaties manifest the treaty makers' intent generally to preclude judicial enforcement of the treaties, and specifically to preclude the availability of a *Young* remedy. However, careful analysis of the Senate record associated with treaty ratification casts doubt on that assumption. The NSE declarations are ambiguous on their face. They can plausibly be construed narrowly to preclude offensive claims for money damages, but to permit judicial enforcement of unique treaty rights when litigants invoke the treaties defensively, or when plaintiffs invoke the APA or the *Young* doctrine to supply a private cause of action for injunctive relief against government officers who violate unique treaty rights. The Senate record associated with treaty ratification, while not dispositive, is not inconsistent with this narrow interpretation of the NSE declarations. Moreover, this narrow interpretation is justified by the rule-of-law and federal supremacy interests underlying the *Young* doctrine, and by the treaty makers' manifest intention to ensure U.S. compliance with its treaty obligations.